

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 42.

THE UNITED STATES, APPELLANT,

VS.

STANLEY FIELD, AS EXECUTOR OF THE ESTATE OF
KATE FIELD, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

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1 I. PETITION AND EXHIBITS. FILED MAY 6, 1920.

STATE OF ILLINOIS,
County of Cook, ss:

In the Court of Claims of the United States.

STANLEY FIELD, AS EXECUTOR OF THE
estate of Kate Field, deceased.

vs.

No. 34595.

UNITED STATES OF AMERICA.

Petition.

May 6, 1920.

To the Honorable Judges of Said Court:

1. Petitioner, Stanley Field, a citizen of the State of Illinois and a resident of the city of Chicago, as executor of the estate of Kate Field, deceased, files this petition to recover from the United States of America the sum of \$121,059.60, with interest thereon at the legal rate from February 19, 1920, being the amount paid by petitioner to the collector of internal revenue of the United States for the First District of Illinois as an additional estate tax assessed and wrongfully collected by the Commissioner of Internal Revenue of the United States on the estate of Kate Field, deceased, and paid by said petitioner under duress and written protest.

2. Kate Field, who was the mother of petitioner, died a resident of Chicago, Ill., on April 29, 1917, leaving a last will and testament under which petitioner was nominated executor.

3. Said will of Kate Field was duly filed in the Probate Court of Cook County, Ill., and after hearing was, by order of said Court admitted to probate on the 20th day of June, 1917, and on the same day letters testamentary were issued to petitioner, as executor under said will (a copy of which said will is attached hereto and made a part hereof as Exhibit "A"); and a duly authenticated copy of the record of petitioner's said appointment as such executor is filed herewith.

4. In and by said last will and testament said Kate Field made the following disposition of her individual property:

(a) Various specific legacies aggregating in value ninety-three thousand five hundred dollars (\$93,500.00);

(b) All the rest, residue and remainder of her estate testatrix gave in equal shares to her three daughters, Maud Field Clegg, Laura Field Clegg, and Josephine Field Crossley.

5. Joseph N. Field, who was the husband of testatrix, died a resident of Chicago, Ill., on April 29, 1914, leaving a last will and testament and codicil thereto. Said last will and testament and codicil

of said Joseph N. Field, deceased, was duly filed in the Probate Court of Cook County, Ill., and after due hearing was, by order of said Court, admitted to probate on the 11th day of August, 1914 (a copy of which said will and codicil is hereto attached and made a part hereof as Exhibit "B").

6. In and by his last will and testament Joseph N. Field, after making certain specific bequests, gave and devised all the residue of his estate to petitioner, Stanley Field, and to Arthur B. Jones, of Chicago, as trustees, with full power and authority to sell, assign, transfer, and convey the same, and with direction to divide said estate into separate trust funds, the first of which trust funds was provided for as follows:

3 "If my wife, Kate Field, shall survive me, one-third ($\frac{1}{3}$) of said trust estate shall be set apart and held as a separate trust fund for the benefit of my said wife, and the net income derived therefrom shall be paid to my wife during her life, and from and after her death the net income from one-half ($\frac{1}{2}$) of said share of said trust estate shall be paid to such persons, and in such shares as she shall appoint by her last will and testament."

Said testator further provided that said trust should continue until the death of the last survivor of testator's grandchildren living at the time of his death. Said grandchildren were eleven in number at the date of the death of Kate Field, deceased.

7. Said Kate Field, in and by her last will and testament, in addition to disposing of her individual estate as above described, exercised the power of appointment so given to her by the will of her said husband, Joseph N. Field, in the following manner:

"Seventh. Under the will of my late husband, Joseph N. Field, I am given the power to dispose of the net income from one-half of a trust fund from and after the date of my death, I receiving the whole of the net income from said trust fund during my life, and in the exercise of said power I do hereby direct that the income over which I have the power of appointment as aforesaid shall be paid in equal shares to my children surviving at the date of the respective payments which shall be made out of the income from said trust fund; provided, however, that the surviving issue of any deceased child shall stand in the place of and receive the share of said net income which such deceased child would have been entitled to receive if living at the date of the respective payments out of said income."

4 8. The internal revenue act of the United States of 1916, Title II, in effect September 9, 1916, as amended March 3, 1917, provided in section 201 as follows:

"That a tax (hereinafter in this title referred to as 'The Tax') equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three is hereby imposed upon the transfer of the net estate of every decedent dying

after the passage of this act, whether a resident or nonresident of the United States:

1½ per centum of the amount of such net estate not in excess of \$50,000.

3 per centum of the amount by which such net estate exceeds \$50,000, and does not exceed \$150,000, etc."

Said law further provided in section 202 as follows:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;"

5 9. Said United States internal revenue act of 1916, as amended, provided in section 212 that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, should make such regulations and prescribe and require the use of such books and forms as he might deem necessary to carry out the provisions of said Title II. Plaintiff is informed and believes, and therefore states the fact to be, that acting under the power of said section 212, the Commissioner of Internal Revenue issued certain regulations, among which regulations No. 37, revised in May, 1917, Art. XI, provides as follows:

"Property passing under a general power of appointment is to be included as a portion of the gross estate of a decedent appointor."

10. As executor of the estate of Kate Field, deceased, petitioner duly made a tentative return for estate tax to Julius F. Smietanka, collector of internal revenue of the United States for the first district of Illinois, and filed said return in the office of said collector on, to wit, the 11th day of July, 1917 (a copy of which said return is attached hereto and made a part hereof as Exhibit "C"); said return showed that the net individual estate of Kate Field, deceased, subject to tax, amounted to the sum of \$355,011.22. A tax thereon, amounting to the sum of \$14,550.67, was duly paid by petitioner to said collector of internal revenue on, to wit, the 11th day of July, 1917 (the actual amount in cash paid by petitioner was \$13,968.65,

being said sum of \$14,550.67 less the statutory discount of 5 per cent); and said Julius F. Smietanka issued to petitioner, as said executor, a receipt for said tax (copy of which said receipt is attached hereto and made a part hereof as Exhibit "D").

6 Said return for estate tax so made by petitioner, as executor of said estate, did not include any of the property of the estate of Joseph N. Field, deceased, held in trust as above described, or of the value of the income from said property over a portion of which said income said Kate Field, deceased, had and exercised the power of appointment above described.

11. And afterward the Commissioner of Internal Revenue of the United States made an investigation of the said return and of the value of the individual estate of said Kate Field, deceased, and of the value of said appointed estate, and increased the assessed value of said individual estate and fixed an assessed value on said appointed estate, and thereupon assessed an additional estate tax (over and above the amount paid as aforesaid) amounting to the sum of \$121,619.44, and the said collector of internal revenue did, on December 12, 1919, demand of petitioner that he pay said additional estate tax of \$121,619.44 within thirty days thereafter.

And thereafter, in view of certain errors in the assessment of said additional tax, on January 4, 1920, petitioner filed with the collector of internal revenue for the first district of Illinois, a claim for abatement, claiming an abatement in said additional tax of the sum of \$23,808.65, by reason of certain alleged errors in the assessed value so made by said commissioner.

And thereupon said Commissioner of Internal Revenue reexamined said assessed values and made certain reductions therein, so that the assessed values as finally determined by said commissioner were as follows:

7 Assessed value of said individual estate of Kate Field deceased.....	\$450,675.00
Assessed value of said appointed estate.....	1,449,503.97
Total alleged gross estate.....	1,900,239.26
Less deductions allowed.....	78,458.06
Total alleged net estate.....	1,821,780.50

And upon the alleged net value so fixed said commissioner determined that a total additional tax was due amounting to the sum of \$120,909.58; and on February 19, 1920, H. W. Mager, then acting collector of internal revenue of the United States for the first district of Illinois, demanded of petitioner as an additional estate tax, alleged to be due under said internal revenue act of the United States of 1916, Title II, the said sum of \$120,909.58 and a penalty of \$1,192.53, making a total additional tax and penalty so demanded of \$122,102.11. And said acting internal revenue collector did then and there threaten petitioner, in the event of nonpayment, with certain penalties provided by the statutes of the United States for the punishment of delinquent taxpayers.

12. And thereafter, on February 20, 1920, petitioner paid to said acting collector of internal revenue the said total sum of \$122,102.11, under written protest, a copy of which said protest is attached hereto and made a part hereof as Exhibit "E."

13. And thereafter, on March 3, 1920, petitioner filed in the office of said acting internal revenue collector a claim for refund, claiming said amount now sued for, being the sum of \$121,059.60. Said claim of \$121,059.60 is that part of the total additional tax and interest which was assessed by said Commissioner of Internal Revenue

on the theory that that part of said trust estate of Joseph N. Field, deceased, over which said Kate Field, deceased, exercised a power of appointment was a part of the gross estate of Kate Field, deceased, within the meaning of said internal revenue law of 1916, Title II, and does not include any part of said additional tax which was fixed on account of the increased assessment so determined by said Commissioner of Internal Revenue on the individual estate of Kate Field, deceased. A copy of said claim for refund, with a copy of the receipt thereto attached, is attached hereto and made a part hereof as Exhibit "F."

14. And afterward, on, to wit, the 29th day of March, 1920, said claim for refund so filed by said petitioner was considered and rejected by said Commissioner of Internal Revenue.

15. It is contended by this petitioner that no part of the Joseph N. Field estate over which said Kate Field had and exercised her power of appointment is, or ought to be, construed as a portion of the gross estate of said deceased appointor, Kate Field, within the terms of said internal revenue act of 1916, Title II, as amended, and that therefore no tax is due or collectible upon the estate so passing or to pass pursuant to the exercise of said power of appointment, and that said internal revenue law of 1916, Title II, did not authorize the assessment or collection of said tax, and that said sum of \$121,059.60, being the additional tax fixed in said estate as due because of the commissioner's contention that said appointed estate was a part of the gross estate of said Kate Field, deceased, was wrongfully collected and should be paid to this petitioner with interest.

16. Petitioner further represents that he is the sole and absolute owner of the claim herewith presented, and that he has made no transfer or assignment of said claim, or of any part thereof, and

that petitioner is justly entitled to the amount claimed herein from the United States, after allowing all just credits and offsets; that petitioner has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government, and that he believes the facts as stated in this petition to be true.

Petitioner therefore prays judgment in his favor and against the United States of America for the said sum of \$121,059.60, and interest.

STANLEY FIELD,
As Executor of the Estate of Kate Field, Deceased,
112 West Adams Street, Chicago, Ill.

CARLISLE, HOWE & SWAYZE,
Attorneys for Petitioner, 717 Fourteenth Street NW.,
Washington, D. C.

WILSON, McILVAINE, HALE & TEMPLETON,
Chicago, Ill.,
Of Counsel.

STATE OF ILLINOIS,
County of Cook, ss.

Stanley Field, being first duly sworn, on oath says, that he has read the foregoing petition subscribed by him, and that the same is true in substance and in fact.

STANLEY FIELD.

Subscribed and sworn to before me this 29th day of April, A. D. 1920.

RICHARD H. PEEL,
Notary Public for Cook County, Ill.

10

Exhibit "A."

Last will and testament of Kate Field, deceased.

I, Kate Field, of Chicago, Ill., do make this my last will and testament as follows:

First. I direct that all claims against my estate and also all inheritance taxes, so called, be paid as soon as practicable after my death. It is my will that the bequests given herein, other than to my residuary legatees, be paid free from any deduction by reason of inheritance taxes, or any other deduction whatsoever.

Second. I give and bequeath five thousand dollars (\$5,000.00) to Mrs. Libby Bell, of Rushville, Ill.

Third. I give and bequeath two thousand dollars (\$2,000.00) to Mrs. Ida M. Eddy.

Fourth. I give to my son Stanley Field, as trustee, sixty-five hundred dollars (\$6,500.00), to be kept invested, and the net income derived therefrom to be paid to Ella Campbell for and during her life; the principal of said trust fund to go to my residuary legatees upon her death.

Fifth. I give and bequeath to each of my three sons-in-law, Henry Gordon Clegg, William G. Clegg and Sir Kenneth Crossley, Bart., the sum of twenty-five thousand dollars (\$25,000.00).

Sixth. I give and bequeath to my niece, Grace James Gillette, the sum of five thousand dollars (\$5,000.00).

Seventh. Under the will of my late husband, Joseph N. Field, I am given the power to dispose of the net income from one-half of a trust fund from and after the date of my death, I receiving the
 11 whole of the net income from said trust fund during my life, and in the exercise of said power I do hereby direct that the income over which I have the power of appointment as aforesaid shall be paid in equal shares to my children surviving at the date of the respective payments which shall be made out of the income from said trust fund; provided, however, that the surviving issue of any deceased child shall stand in the place of and receive the share of said net income which such deceased child would have been entitled to receive if living at the date of the respective payments out of said income.

Eighth. All the rest, residue, and remainder of my estate I give and bequeath in equal shares to my three daughters, Maud Field Clegg, Laura Field Clegg, and Josephine Field Crossley.

Ninth. I appoint my son Stanley Field executor of this my last will and testament, and direct that no bond or security be required of him as such executor.

In witness whereof I have hereunto set my hand and seal this 7th day of January, A. D. 1916.

(Signed) KATE FIELD. [SEAL.]

The foregoing instrument was, on the day of the date thereof, signed, sealed, and declared by the said testatrix Kate Field, to be her last will and testament, in the presence of us, who, at her request and in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

(Signed) CHARLES E. MARTIN.
 FRED H. REYNOLDS.
 JAMES M. BARNES.

12

Exhibit "B."

Last will and testament of Joseph N. Field.

I, Joseph N. Field, of Chicago, State of Illinois, do hereby make, publish and declare this my last will and testament as follows, hereby revoking all prior wills:

First. I direct my executors to pay all just debts and claims against my estate within a reasonable time after my decease.

Second. I give, devise and bequeath to my wife, Kate Field, in case she shall be living at the time of my death, all my right, title and interest in and to the premises in the town of Bowdon, Cheshire, England, near Manchester, known as "Ashleigh," as well as any other premises which we may be occupying as a family residence at

the date of my death, and also in and to all the household furniture, books, pictures, plate, linen, horses, carriages, harnesses and contents of stable, and other personal property used in and about or in connection with the said premises above mentioned, at the time of my decease.

Third. I give and bequeath to each of my nephews, Dwight James, Howard James and Philip James, and to each of my nieces, Mrs. Grace James Gillett, Bertha Dibblee King, Frances Dibblee Sprague, Ethel Field Beatty, Minna Field Gibson, and Florence Field Lindsay, provided they shall respectively be living at my death, the sum of ten thousand dollars (\$10,000.00) as a remembrance.

Fourth. I give and bequeath to my cousin, Lucy Ann Field, of New Jersey, daughter of my late uncle, William Field, in case she shall be living at the time of my death, the sum of five thousand dollars (\$5,000.00).

Fifth. I give and bequeath to Paula Reif Huck, if she be living at the time of my death, the sum of ten thousand dollars (\$10,000.00),

13 Sixth. I give and bequeath to Arthur B. Jones, of Chicago, if he be living at the time of my death, the sum of ten thousand dollars (\$10,000.00).

Seventh. I give and bequeath to Mrs. Ida M. Eddy, if she be living at the time of my death, and shall not have contracted a second marriage, the sum of two thousand dollars (\$2,000.00).

Eighth. I give and bequeath to Ella Campbell, if she shall be in my employ at the time of my death, the sum of three hundred pounds sterling (£300).

Ninth. I direct that all inheritance succession, or legacy taxes or duties be paid out of my residuary estate, so that the foregoing bequests and legacies shall be free from any deduction on account of such tax or duty.

Tenth. I give, devise, and bequeath unto my son, Stanley Field, and Arthur B. Jones, both of Chicago, State of Illinois, and the survivor of them, and to their successors as trustees, all of the rest, residue, and remainder of my property and estate, real, personal, and mixed, and wherever situated, to have and to hold upon the trusts, terms, and conditions following:

(a) Said trustees shall have full power and authority to sell, assign, transfer, and convey any and all or any part of the trust property which shall at any time form a part of the trust estate under this will and convert the same into cash at such time or times and upon such terms or conditions as to my said trustee shall seem best, and to make, execute, and deliver all deeds of conveyances and other instruments in writing as may be in the opinion of said trustees necessary or proper for the best management of said trust estate; to execute leases of any real estate which shall form a part of said trust at any time, at such rental and for such length of time, not exceeding two hundred (200) years, as they may think best. They shall

14 also have power to erect buildings or to change, alter, or make

additions to any existing buildings upon any real estate forming a part of said trust estate, and also to retain any investments in real or personal property which shall come into their possession under this will as trustees, for such time as they shall deem it for the best interests of the trust so to do; and also to invest and reinvest from time to time any funds coming into their hands as trustees as aforesaid, and not paid out to beneficiaries under the provisions of this will, in such real or personal property, including stocks of corporations, as shall commend themselves to the business judgment of said trustees; and to do all other acts in relation to the said trust estate or in relation to its disposition or investment which in the judgment of said trustees shall be needful or desirable to the proper and advantageous management of said trust estate, so as to protect the same and to make the same productive; it being my intention by this will to vest in my said trustees authority to do all things in regard to the said trust estate in the same manner and to the same extent as I might or could do if living, which shall seem expedient and best to them, in order to carry out the provisions and intents of this my last will and testament.

(b) The said trust shall be divided by said trustees as soon as may be after the same shall come into their possession, into separate trust funds, as follows:

(1) If my wife, Kate Field, shall survive me, one-third ($\frac{1}{3}$) of said trust estate shall be set apart and held as a separate trust fund for the benefit of my said wife, and the net income derived therefrom shall be paid to my wife during her life, and from and after her death the net income from one-half ($\frac{1}{2}$) of said share of said trust estate shall be paid to such persons, and in such shares, as she shall appoint by her last will and testament.

15 (2) Three-twelfths ($\frac{3}{12}$) of said trust estate, subject to the provision above made for my wife, shall be set apart and held as a separate trust fund for each of my two sons, Stanley and Norman, and two-twelfths ($\frac{2}{12}$) thereof as a fund for each of my three daughters, Maud, Laura, and Florence Josephine.

In setting apart and dividing said trust estate into the separate funds above specified, the trustees may set apart and allot undivided interests in different parts and parcels of said trust estate, and the judgment of said trustees in making said division shall be final and conclusive upon all parties in interest and said trustees may make joint investments on behalf of said separate trust funds; the several trust funds to be interested in such joint investments in proportion to their several investments therein. The net income from the several funds so created for my respective children shall be paid over to them during their respective lives, at such times and in such amounts as my trustees in their discretion may determine to be for the welfare of such respective children, but so as in any event to provide liberally for their support and maintenance, and any unex-

pected income shall be added to the principal of the particular fund from which the same is received. At the death of each child the payment of income shall be continued under like discretionary powers to his or her lawful issue per stirpes until the death of the last survivor of my grand children who shall be living at my death, at which date each separate trust fund then in the hands of my trustees shall be divided per stirpes among the then surviving lawful issue of the son or daughter for whom the same was held.

If at any time during the duration of the said trust there shall be a failure of lawful surviving issue of either of my said children at or after his or her death, the trust fund held for such child, with its accumulations, shall then be equally divided among the remaining funds created by this paragraph, and become a part thereof; subject, however, to the qualification that each of my children dying without leaving any lawful issue surviving at the date of his or her death shall have power to dispose by last will and testament of one-third ($1/3$) of the trust fund then held for him or her, and provided further, that if the trust fund created for my son Stanley shall have been paid over to him, then the share of any trust fund which would have been added to the trust fund created for him had the same continued to be held in trust, shall be paid over and delivered to him if he shall then be living, and if he shall not then be living shall be paid over and disposed of as he shall direct by his last will and testament, and in default of any disposition thereof by his last will and testament, then to the persons who would at the date of such payment have been his heirs at law under the statutes of the State of Illinois if he had then died intestate.

It is my will and I direct that the said trustees shall convey, transfer, and pay over to my said son Stanley, at any time when he shall make request therefor, the trust fund created for him by the foregoing provisions of this will. I also authorize and empower said trustees in their discretion to pay over to my said son, Norman, upon his request, at any time or times after he shall reach the age of forty (40) years, an amount or amounts in the aggregate not exceeding one-fourth ($1/4$) of the trust fund created for him by the foregoing provisions of this will.

If either of my children should die before me, or after me, but before the division of the estate into separate funds as aforesaid, leaving lawful issue, a fund shall be created for such issue, consisting of the proportion of my residuary estate which would have been set apart under the foregoing provisions of this will for the parent if living.

Upon the death, resignation, refusal, or inability to act, or further act, of either of the said trustees hereinbefore named, I appoint James Simpson, of the city of Chicago, trustee, to fill the vacancy so arising, to the end that there may be at least two trustees under this will; and in the event of the said James Simpson failing for

any cause to act or further act as trustee hereunder, as above provided, or in case any other vacancy in said trusteeship shall occur from any cause whatsoever, The Northern Trust Company, a corporation organized under the laws of the State of Illinois, is hereby appointed trustee and successor in trust under this will; and in any event at the expiration of ten (10) years from the date of my death the said The Northern Trust Company is hereby appointed a trustee hereunder, and the trustees for the time being acting under this will shall have and exercise equal rights and powers as such trustees, and if and when the said The Northern Trust Company shall become the sole trustee under this will by reason of the death, resignation, or inability to further act of the persons hereinbefore named as trustees, or successors in trust, the said The Northern Trust Company shall have and possess all the rights, powers, duties, and authority vested in the original trustees herein named.

Said trustees shall not be required to give any bond or security for the performance of their duties as trustees, and I exempt every trustee under this will from any liability for loss occurring without his or its own wilful default, and allow him to retain and allow his co-trustees, all such proper charges and expenses as are incidental to

the trusteeship, and purchasers from the trustees shall not be
18 holden to see to the application of the purchase money. And

I authorize the trustees under this will to receive a reasonable compensation for their services as such trustees, having due regard to the time and labor they may respectively contribute to the duties of their trust. If at any time in the management of any of said trust funds or estate under the charge of three trustees there shall arise any conflict or difference of opinion among the trustees, I direct that the judgment and opinion of a majority of the trustees in regard to the conduct and management of the trust funds or estate shall prevail.

If the period during which the trustees are vested with discretion in regard to the amount of the net income from the several trust funds to be paid to the several beneficiaries, the residue of such income to be accumulated, shall exceed the time allowed by law for the exercise of such discretion and accumulation, then and in every such case the right to exercise such discretion as to the amount of income paid to the beneficiaries shall continue during the period of twenty-one (21) years from and after my death, and for such longer period, if any, as may be lawful, and during the residue of the term of said trust the entire net income from the several trust funds shall be paid from time to time to the respective beneficiaries who are entitled to participate therein, per stirpes.

The trustees under this will are directed to keep full and accurate books of account, showing all their transactions as such trustees, which shall at all reasonable times be open to the inspection of the beneficiaries interested in the several trusts, and on or before March

1st in each year said trustees shall furnish to each beneficiary entitled to share in the income of either of the said trusts a written statement showing the condition of the trust estate and the
19 income received, and the disbursements and investments made by the trustees during the last preceding calendar year in connection with the trust in which such beneficiary is interested.

In the event of any vacancy occurring in the trusteeship not herein specifically provided for, any court of competent jurisdiction holding its session in the city of Chicago, State of Illinois, shall have power, upon the joint application in writing of all the beneficiaries hereunder, then of lawful age, to appoint the person or persons (or corporation) who shall be nominated by the said beneficiaries to be a successor or successors in trust hereunder, either with or without bond, as may be specified by request of the beneficiaries, but such power shall not be exercised so long as The Northern Trust Company is able and willing to administer the trusts hereby created, either alone or as co-trustee with one or more of the trustees hereinbefore named.

The trusts created by this will are made for the purpose of providing a suitable support and maintenance for the respective beneficiaries hereinbefore named, and such beneficiaries shall have no power to anticipate or assign the income which shall be payable to them respectively under the provisions of this will, and such income shall not be liable to be taken away from any such beneficiaries by process of law or otherwise.

Eleventh. I hereby nominate and appoint Stanley Field and Arthur B. Jones executors of this my last will and testament, and in the event of either of them failing to qualify or to act, or further act, as executor under this will, then I appoint James Simpson executor or co-executor under this will, and direct that neither of said parties be required to give bond or security as such executor.

I further direct my executors to pay over to my wife hereinbefore named one-third ($\frac{1}{3}$) of the net income received by them as executors
from such part of my estate as shall remain in their hands
20 from time to time, until the same shall be turned over to the trustees hereinbefore appointed in this will.

Although I have been living in England for some years for business reasons, I have always retained my citizenship in Chicago and have never changed or intended to change my legal residence, and it is my direction that my original will be probated at Chicago, and that the principal administration of my estate be there.

In witness whereof I have hereunto set my hand and seal this eighth day of November, A. D. 1911.

JOSEPH N. FIELD. [SEAL.]

The foregoing instrument was, on the day of the date thereof, signed, sealed, and declared by the said Joseph N. Field to be his last will and testament, in the presence of us, who, at his request

and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

JOHN P. WILSON.
WILLIAM B. McILVAINE.
JOHN P. WILSON, Jr.
WILLIAM R. DICKINSON.

Will proved and admitted to record in open court this 11 day of Aug., A. D. 1914.

DANIEL H. GREGG, *Probate Judge.*

STATE OF ILLINOIS,
County of Cook, ss:

In the Probate Court of Cook County proved and admitted to record in open Court this 11th day of August, A. D. 1914.

JOHN A. CIVENKA, *Clerk.*

Filed Aug. 11, 1914.

JOHN A. CIVENKA, *Clerk.*

21 I, Joseph N. Field, do make the following codicil to my last will and testament, bearing date the eighth day of November, A. D. 1911, viz:

I give to my son Stanley Field and my friend Arthur B. Jones, of Chicago, as trustees, the sum of five hundred thousand dollars (\$500,000.00), to be delivered to them either in cash or securities selected by my executors, at their market value, said fund to be held and used, both principal and income, for the aid and relief of persons who shall have been in the employ of Marshall Field & Company for not less than ten (10) years prior to my death, and who shall be in need of assistance by reason of sickness, age, disability, or other cause.

The time of service above specified need not be continuous, and may include service rendered as well to the copartnership as to the corporation doing business under the name of Marshall Field & Company.

The distribution of the charitable fund hereby created may in the discretion of said trustees extend to the aid of the families of deceased employees who if living would have come within the class of beneficiaries above designated, in cases where such families shall be in need of aid. It is my will that the entire fund, both principal and income, be appropriated and used for the purposes above specified within twenty (20) years after my death, it being my intention to provide aid for persons (or their families) who shall have been in the employ of Marshall Field & Company during the time I have been interested in its business. It is further my will that the judgment and discretion of said trustees and their successors in trust in paying out any of said trust moneys to the members of the class of beneficiaries above designated shall not be subject to question or review.

22 My said trustees, and the survivor of them and their successors, shall have power at any time, and from time to time,

to appoint, by an instrument in writing signed by them or him, a successor or successors to fill any and all vacancies which may arise in said trusteeship, to the end that there may be two active trustees to carry out said trust.

I direct that all inheritance, succession, or legacy taxes or duties, if any, against the bequest made by this codicil, be paid out of my residuary estate, so that the foregoing bequest shall be free from any payment on account of any such tax or duty.

Except as modified by this codicil I confirm my said will.

In witness whereof I have hereunto set my hand and seal this thirty-first day of October, A. D. 1912.

JOSEPH N. FIELD. [SEAL.]

The foregoing instrument was, on this thirty-first day of October, A. D. 1912, signed by the above named Joseph N. Field, and declared by him to be a codicil to his last will and testament in the presence of us, who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

JOHN P. WILSON.

WILLIAM B. McILVAINE.

WILLIAM R. DICKINSON.

Codicil proved and admitted to record in open court this 11 day of Aug., A. D. 1914.

DANIEL H. GREGG, *Probate Judge.*

STATE OF ILLINOIS,

County of Cook, ss:

In the Probate Court of Cook County codicil proved and admitted to record in open court this 11 day of Aug., A. D. 1914.

JOHN A. CERVENKA, *Clerk.*

Filed Aug. 11, 1914.

JOHN A. CERVENKA, *Clerk.*

(Endorsed:) Will of Joseph N. Field. Recorded in probate documentary record of wills, book 89, page 343.

Exhibit "C."

(This return must be filed within one year after the day of death of the decedent whose estate is returned.)
(Form No.)

TO BE FILLED IN BY INTERNAL REVENUE
BUREAU.

TREASURY DEPARTMENT,
INTERNAL REVENUE BUREAU.

TO BE FILLED IN BY COLLECTOR,
Collection District.

Audited by

Return for Estate Tax.
(Title II, Act of September 8, 1916.)

Assessment List....., 191

AN ITEMIZED INVENTORY OF THE PROPERTY OF EVERY KIND OWNED BY DECEDENT AT TIME OF DEATH, WITH LEGAL
DEDUCTIONS.

Decedent's name, Field, Kate.

(Write family name first, given names after.)

Residence at time of death, 1550 No. State Parkway Street, Chicago,
(City or town.)

Date of death, April 29, 1917.

Illinois.

(State, Territory, or foreign country.)

NOTE.—This return is required of the estate of every nonresident of the United States, Hawaii, or Alaska leaving property or interests in the United States, Hawaii, or Alaska. This return is required of every resident's estate exceeding in gross value \$60,000 or in net value \$50,000. (See sections 202 and 203 of the act.)

PENALTIES.—1. For knowingly making false statement in this return, a fine not exceeding \$5,000, or imprisonment, or both. 2. For failure to file as required by section 205 of the act, a fine not exceeding \$500, with costs of suit. (See section 210 of the act.)

The Gross Estate.

(See section 203 of the act and Articles IV to VIII of Regulations No. 27.)

NOTE.—If the decedent was a nonresident of the United States, Hawaii, or Alaska, there is to be entered in the space below only such items of the gross estate as at the time of the decedent's death were located or had their situs in the United States, Hawaii, or Alaska. All the property and interests of a resident decedent, regardless of their location or situs, are to be itemized below:

1. Real Estate.

1	2	3	4
Location.	Value at decedent's death.	Assessed valuation, current tax year.	Present market value (actual receipts if sold).
None.	\$.	\$.	\$.
Total.....			

2. Personal Property.

A. Stocks and bonds.

NOTE.—The final paragraph of section 202 of the act provides that for the purpose of the estate tax "stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States." All stocks and bonds of domestic corporations owned by a nonresident decedent for whose estate this return is made must be listed below:

1	2	3	4
No. of shares or bonds.	Description or designation.	Market value day of decedent's death.	Actual value if no market value.
300	Commonwealth Edison Co. @ 132	\$39,600	0
30	Commonwealth-Edison Co., being fully paid subscription receipt for new stock @ 125.	3,840	
100	Illinois Central R. R. Co. @ 1044	10,450	
100	Illinois Trust and Savings Bank @ 475	47,500	
100	Insurance Exchange Building Corporation, pld. @ 1044	20,500	
275	Midline Flow Company, first pld. @ 96.	26,400	
100	Public Service Co., of Northern Illinois, pld. @ 100.	10,000	
300	The Pullman Company @ 1504	31,100	
305	U. S. Government 3½ bonds due July 1, 1917, face value \$1,000 each, @ 100 and int.	305,500	
	Total	395,390	

25 B. Miscellaneous property.— Mortgages and promissory notes, insurance payable to the estate, cash, shares in action, good will of decedent's business, decedent's vested interest in other estates, personal effects, etc.

1	2	3	4
Designation or description.	Actual value at decedent's death.	Designation or description.	Actual value at decedent's death.
Mortgages (with maturity date): None.	0	Insurance: None.	0
Notes (with maturity date): None.		Cash in banks: Account in Illinois Trust and Savings Bank	9,731.25
		Choses in action: Miscellaneous:	
Total		Total	9,731.25

C. Transfers by deed of trust or other instruments, gifts, or sales without adequate consideration, made by decedent in contemplation of, or intended to take effect at, decedent's death. (See paragraph b and final paragraph, section 202, of the act.)

NOTE.—If decedent was a resident of the United States, Hawaii, or Alaska, the transfers described in section 202, paragraph b, of the act are taxable regardless of the location or status at any time of the transferred property. If decedent was a nonresident, there must be itemized below such transfers described in section 202, paragraph b, as conveyed property located or situated in the United States, Hawaii, or Alaska, either at the time the transfer was made or at the time of decedent's (the transferor's) death.

1	2	3	4	5	6	7	8
Name of transferee, donee, or beneficiary of decedent and address.	Date of transfer.	Manner of transfer.	Kind of property transferred.	Value at time of transfer.	Value at decedent's death.	Income accrued at decedent's death.	Total of columns 6 and 7.
None.				\$	\$	\$	\$
Total.....							

26

FOLD ALONG THIS SPACE.

D. Decedent's share in joint bank accounts, or in other property owned jointly with others. (See paragraph b, section 202, of the act.)

1	2	3	4	5	6
Description.	Location.	Original value decedent's share.	Value decedent's share at decedent's death.	Income accrued at decedent's death.	Total of columns 4 and 5.
None.....		\$.....	\$.....	\$.....	\$.....
TOTAL,					

Deductions from the gross estate. (See articles VIII and IX, regulations 37.)			Tax due.	
NOTE.—Estates of nonresidents, as well as of residents, will show below all expenses, charges, etc., wherever incurred or paid.			Separate portion of net estate and rate thereupon.	Tax.
1. Funeral expense.....	\$		Portion not exceeding \$50,000.....	14%
2. Administration expense.....		\$ 395,290	Portion \$50,000-\$150,000.....	3%
3. Determined claims against the estate.....		9,721.22	Portion \$150,000-\$250,000.....	4%
4. Mortgages outstanding at decedent's death and not deducted in item 1 of gross income.....			Portion \$250,000-\$400,000.....	6%
5. Determined losses during administration.....			Portion \$450,000-\$1,000,000.....	9%
6. Actual expenditures for support of decedent's dependents.....			Portion \$1,000,000-\$2,000,000.....	10%
7. Other charges allowed by the court.....			Portion \$2,000,000-\$3,000,000.....	10%
8. Specific exemption (\$50,000 if decedent was a resident of the United States, Hawaii, or Alaska; no exemption if a nonresident).....		405,011.22	Portion \$3,000,000-\$4,000,000.....	12%
Total deductions.....	\$ 50,000	50,000	Portion \$4,000,000-\$5,000,000.....	13%
			Portion exceeding \$5,000,000.....	15%
			Total tax.....	

Total gross estate wherever situated.....\$
 NOTE.—This space to be filled in only if decedent at time of death was a nonresident of the United States, Hawaii, or Alaska.

* NOTE.—If decedent was a nonresident, the share of total deductions to be taken here is a proportion equal to the proportion the gross estate within the United States, Hawaii, and Alaska is of the whole gross estate, wherever situated.

I, Stanley Field, the undersigned executor, do hereby solemnly swear that the above statement of gross and net estate of Kate Field, the above-named decedent, is in all respects true to the best of my knowledge and belief; that letters testamentary were granted upon the said estate on the 20th day of June, 1917, by the Probate Court at Cook County, Illinois; that no distribution from the estate to beneficiaries has to this date been made, and that this is a tentative return of the estate.

STANLEY FIELD,

Subscribed and sworn to before me at Chicago, Illinois, this 7th day of July, 1917.

WILLIAM R. DICKINSON,
Notary Public, Deputy Collector.

27-28

Exhibit "D."

Form 1. Receipt for advance payments—regular taxes. United States Internal Revenue.

Collector's Office First District of Illinois
At Chicago Date 7/11-1917
Kate Field Estate of
by Stanley Field Executor
1550 N. State Parkway
Chicago, Illinois

Form 58 ----- ; -----
 (Year) (Month)
Form 23 1917 ; July
 (Year) (Month)
 Estate tax

(Description of collection, same
as in column 3, Form 58, for
Act 9/8-16 and 3/3-1917

unassessable items.)

\$13968.65.

Received payment July 11, 1917.

JULIUS F. SMETANKA,

Collector of Internal Revenue.

29 Letters testamentary—Probate Court of Cook County.

STATE OF ILLINOIS,

County of Cook, ss:

The people of the State of Illinois, to all to whom these presents shall come, greeting:

Know ye, that whereas Kate Field, late of the county of Cook and State of Illinois, died on or about the 29th day of April, A. D. 1917, as it is said, after having duly made and published her last will and testament, leaving at the time of her death property in this State, which may be lost, destroyed, or diminished in value if speedy care be not taken of the same; and inasmuch as it appears that Stanley Field has been appointed executor in and by the said last will and testament, to execute the same and to the end that said property may be preserved for those who shall appear to have a legal right or interest therein, and that the said will may be executed according to the request of the said testatrix we do hereby authorize him, the said Stanley Field as such executor to collect and secure all and singular the goods and chattels, rights and credits which were of the said Kate Field at the time of her decease, in whosoever hands

or possession the same may be found in this State, and well and truly to perform and fulfill all such duties as may be enjoined upon him by the said will, so far as there shall be property, and the law charge him and in general to do and perform all other acts which now or hereafter may be required of him by law.

Witness John A. Cervenka, clerk of the Probate Court of said county of Cook, and the seal of said court, this 20th day of June, A. D. 1917.

JOHN A. CERVENKA, *Clerk.*

30 STATE OF ILLINOIS,
County of Cook, ss:

I, John F. Devine, clerk of the Probate Court of Cook County, in the State aforesaid, do hereby certify that the within is a true and correct copy of letters testamentary issued on the 20th day of June, A. D. 1917, to Stanley Field, now in force, as it appears from the originals on file and from the records of the Probate Court in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Probate Court, at Chicago, in said county, this 3d day of May, A. D. 1920.

JOHN F. DEVINE, *Clerk.*

Exhibit "E."

FEBRUARY 19, 1920.

H. W. MAGER, Esq.,
*Acting Collector, U. S. Internal Revenue,
Treasury Department, Chicago, Ills.*

DEAR SIR: I hand you herewith certified check for the sum of \$122,102.11 as payment for additional estate tax, with interest, determined by the Government in the case of Kate Field, deceased.

In paying this amount I do so under protest and compulsion, contending, as I do, that this tax is not justifiable under the laws of the United States or the regulations of the Treasury Department; that it is a tax assessed on the property in the estate of Joseph N. Field, over which Kate Field exercised a power of appointment, and that such tax is not justifiable under the law that was in force on April 29th, 1917, the date of the death of the said Kate Field. I further protest and contend that such tax has not properly been computed for the reason set forth in my claim for refund heretofore filed.

Yours, very truly,

(Signed)

STANLEY FIELD,
Executor.

(Treasury Department, U. S. Internal Revenue, Form 46.)

Claim for refund—Taxes erroneously or illegally collected. Also amounts paid for stamps used in error or excess.

STATE OF ILLINOIS,
County of Cook, ss:

(IMPORTANT—This claim should be forwarded to the collector of internal revenue to whom the tax was paid and must be accompanied by collector's receipt therefor.)

STANLEY FIELD,
As Executor of Estate of Kate Field, Deceased.
112 West Adams St., Chicago, Illinois.

This deponent being duly sworn according to law deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to the claim are true and complete:

1. Business engaged in by claimant: Executor estate Kate Field, deceased.
2. Character of assessment or tax: Additional estate tax.
3. Amount of assessment or stamps----- \$122,102.11
4. Amount now asked to be refunded (or such greater amount as is legally refundable)----- \$121,059.60
5. Date of payment of assessment or purchase of stamps, February 19, 1920.

Deponent verily believes that the amount stated in Item 4 should be refunded and claimant now ask and demands refund of said amount for the following reasons:

32 The above amount of \$121,059.60 now claimed on refund is that part of the total additional tax of \$122,102.11 paid on February 19th, 1920, which has been assessed by the Government on the estate of Kate Field, deceased, on the theory that that part of the trust estate of Joseph N. Field, deceased, over which Kate Field, deceased, exercised a power of appointment, was a part of the gross estate of Kate Field, deceased, within the meaning of the estate tax law.

The total value of the individual estate of Kate Field, deceased, as finally determined on review by the Commissioner of Internal Revenue, was \$450,675.69, from which deductions of \$78,458.68 were allowed, leaving a net individual estate subject to tax of \$372,217.01. The tax computed upon this sum is \$15,583.02, or \$1,032.35 in excess of the amount acknowledged by the Commissioner of Internal

Revenue to have been paid on the first return. Interest at 10% for thirty-six days (the period of the penalty) on this sum of \$1,032.35 amounts to \$10.16, making a total of \$1,042.51 as an additional tax on the individual estate of Kate Field, deceased, determined by the Commissioner of Internal Revenue to be due because of increased assessed values on said individual estate. Therefore, said amount of \$1,042.51 is not claimed on this refund, but the difference between said sum and the total additional tax of \$122,102.11, or \$121,059.60, represents, the tax fixed by the Commissioner of Internal Revenue, as aforesaid, on the estate of Kate Field, deceased, on the theory that that part of the trust estate of Joseph N. Fields, deceased, over which said Kate Field, deceased, exercised a power of appointment was a part of the gross estate of said Kate Field, deceased, within the meaning of the United States internal revenue law of 1916 as amended March 3rd, 1917, title 2; and said amount of \$121,059.60 is therefore claimed on refund.

33 It is contended by this claimant that no part of the Joseph N. Field, deceased, estate, over which said Kate Field had and exercised her power of appointment is or ought to be construed as a portion of the gross estate of said deceased appointor Kate Field, within the terms of said internal-revenue law of 1916, title 2, as amended; and that therefore no tax is due or collectible upon the estate as passing or to pass pursuant to the exercise of said power of appointment, and that said law did not authorize the assessment or collection of said tax, and said tax was paid under written protest.

And this deponent further alleges that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented, except as stated herein, for the refunding of the whole or any part of the amount stated in item 3.

(NOTARIAL SEAL.)

Sworn to and subscribed before me this 3rd day of March, 1920.

(Signed) STANLEY FIELD,

Executor of Estate of Kate Field, deceased.

FRED M. OUTHOUSE, *Notary Public.*

/s/

(Name.)

(Title.)

(This affidavit may be sworn to before a deputy collector of internal revenue without charge.)

Filed March 4, 1920, 10 a. m., in internal-revenue office,
Chic.

Receipt attached to claim for refund as follows:

(Copy)

(Treasury Department, U. S. Internal Revenue Form 803.)

ESTATE TAX RECEIPT.

Executor's copy (in duplicate).

Collector First District of Illinois. At Chicago, Ill. Date Feb. 19, 1920.

NOTE.—Payment of the tax indicated by the return on Form 706 is not conclusive as to ultimate tax liability. An investigation will be conducted to verify the accuracy of the return. If tax in excess of the amount indicated by the return is disclosed and one year and 180 days have elapsed since the date of decedent's death interest will attach at the rate of 10 per centum per annum on and after the expiration of 30 days from receipt of notice of such excess tax. Section 407, Revenue Act of 1918.

Estate of Kate Field, deceased.
STANLEY FIELD,
219 W. Adams Street,
Chicago, Ill.
Received payment, Feb. 20, 1920,
H. H. MAGER,
By _____
Acting Collector of Internal
Revenue First District Illinois.

List 23A Feb. _____	(Month)
Date of death, April 29, 1917. _____	
Tax according to return \$ _____	Interest 6% _____
days _____	\$ _____
_____	% penalty _____
\$ _____	Balance of tax according to Commissioner's notification _____
Int. 10% 10 days _____	\$120,909.58
	1,192.53
Total _____	\$122,102.11

Received payment,
Paid under protest,
Collector of Internal Revenue.

35 II. DEFENDANT'S DEMURRER. FILED MAY 8, 1920.

Defendant demurs to the plaintiff's petition on the ground that the facts stated therein do not constitute a cause of action.

FRANK DAVIS, Jr.,
Assistant Attorney General.

T. K. SCHMUCK,

FRED K. DYAR,

Special Assistants to the Attorney General.

III. ARGUMENT AND SUBMISSION OF DEMURRER.

On June 1, 1920, the demurrer in this case was argued and submitted by Mr. T. K. Schmuck, for the defendant, and by Mr. William B. Hale, for the plaintiff.

IV. OPINION OF THE COURT BY HAY, J., ON DEMURRER.
FILED JUNE 7, 1920.

OPINION.

HAY, Judge, delivered the opinion of the court:

This is a petition filed in this court by Stanley Field, executor of the estate of Kate Field, deceased, to recover the sum of \$121,059.60, which it is alleged was the amount of a tax wrongfully assessed and collected from said estate by the collector of internal revenue of the United States for the first district of Illinois. To this petition of the plaintiff the defendants have demurred.

The plaintiff alleges in his petition that on November 8, 1911, Joseph N. Field, a citizen of Illinois, executed his will by which he devised the residue of his estate, after payment of certain specific legacies, to trustees. One of the provisions of said will was as follows: "If my wife, Kate Field, shall survive me, one-third ($\frac{1}{3}$) of said trust estate shall be set apart and held as a separate trust fund for the benefit of my said wife, and the net income derived therefrom shall be paid to my wife during her life, and from and after her death the net income from one-half ($\frac{1}{2}$) of said share of said trust estate shall be paid to such persons, and in such shares as she shall appoint by her last will and testament." Joseph Field died April 29, 1914, and his will was probated in the probate court of Cook County, Ill.

On January 7, 1916, Kate Field executed her will wherein she executed the power of appointment given her by the will of Joseph Field. Kate Field died on April 29, 1917, and her will was probated in the probate court of Cook County, Ill., and the plaintiff was appointed executor of her estate. The collector of internal revenue, claiming to act under the income-tax act of 1916, 39 Stat., 756, and the regulations issued thereunder by the Commissioner of Internal Revenue of the United States, included as part of the gross estate of Kate Field the appointed estate passing under the execution by her of the general power of appointment given her by the will of Joseph Field, and proceeded to assess and collect an inheritance tax on the net value thereof. The plaintiff paid said tax under protest.

The income-tax act of September 8, 1916, among other things, provides (39 Stat., 777): "Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated: (a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate. (b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to

which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth."

The questions for determination are whether or not the property passing by the execution of the general power of appointment authorized by the will of Joseph Field is subject to the payment of the tax provided for in the income-tax act above quoted, and whether the passing of such an estate is such a transfer of property as is contemplated by paragraph (b) of section 202 of said act.

37 It is a cardinal rule that statutes imposing taxes upon the citizen must be construed in favor of the taxpayer. The intent of Congress to impose a tax upon any specific property or estate should be expressed in clear and unambiguous language. In the case of *Gould v. Gould*, 245 U. S., 151, 153, the court said: "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government and in favor of the citizen."

In the act of 1916 there is no provision for taxing property passing under a general power of appointment exercised by a decedent by will, nor is it possible by a fair or reasonable construction to include appointed property in the property mentioned in paragraph (a) of section 202 of the act.

Appointed property is something definite and specific, which Congress could have taxed under the provisions of the act of 1916 had it seen fit to do so; and that Congress so regarded it is shown by the fact that in the act of 1918 amending the act of 1916 Congress specifically provided: "Sec. 402 (e). To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in, possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth." 40 Stat., 1097.

We do not think that the transfer of appointed property is such a transfer as is provided for in section 202, paragraph (b) of the act of 1916. The provisions of the statute do not impose a tax upon gifts made by will, but relates to transfers made before death.

For the foregoing reasons the demurrer of the defendants must be overruled, and it is so ordered.

The majority of the court concur in this opinion.

V. SUBMISSION OF CASE ON AGREED STATEMENT OF FACTS.

On June 28, 1920, this case was submitted on agreed statement of facts by Mr. Walter Bruce Howe, for the plaintiff, and by Mr. Assistant Attorney General Frank Davis, jr., for the defendant.

38 VI. FINDINGS OF FACT AND CONCLUSION OF LAW. FILED JUNE 28, 1920.

(Exhibits referred to attached.)

This case having been heard by the Court of Claims the court, upon the evidence, which consists of an agreed statement of facts made by the plaintiff through his attorney and the United States by its Assistant Attorney General, makes the following

FINDINGS OF FACT.

I.

The plaintiff, Stanley Field, is the duly appointed executor of the estate of Kate Field, deceased, who died testate a resident of Chicago, Illinois, on April 29, 1917. A duly authenticated copy of the record of plaintiff's said appointment as such executor is attached hereto and made a part hereof as "Exhibit D-a."

II.

The will of Kate Field, deceased, was duly admitted to probate by the Probate Court of Cook County, Illinois, on June 20, 1917, a copy of which will being attached hereto and made a part hereof as "Exhibit A." By said last will and testament said Kate Field disposed of her individual property as follows:

39 (a) Various specific legacies aggregating in value ninety-three thousand five hundred dollars (\$93,500.00);

(b) All the rest, residue and remainder of her estate testatrix gave in equal shares to her three daughters, Maud Field Clegg, Laura Field Clegg, and Josephine Field Crossley.

III.

That Joseph N. Field, the husband of Kate Field, died testate April 29, 1914, a resident of Chicago, Illinois. The last will and testament and codicil of said Joseph N. Field was duly admitted to probate in the Probate Court of Cook County, Illinois, on August 11, 1914.

IV.

That by the last will and testament of Joseph N. Field, after making certain specific bequests, he gave and devised all the residue of his estate to Stanley Field and Arthur B. Jones, of Chicago, as trustees, with full power and authority to sell, assign, transfer, and convey the same and with direction to divide said estate into separate trust funds, the first of which trust funds was provided as follows:

"(b) The said trust shall be divided by said trustees as soon as

may be after the same shall come into their possession, into separate trust funds, as follows:

"(1) If my wife, Kate Field, shall survive me, one-third ($\frac{1}{3}$) of said trust estate shall be set apart and held as a separate trust fund for the benefit of my said wife, and the net income derived therefrom shall be paid to my wife during her life, and from and after her death the net income from one-half ($\frac{1}{2}$) of said share of said trust estate shall be paid to such persons, and in such shares as she shall appoint by her last will and testament.

40 "(2) Three-twelfths (3-12) of said trust estate, subject to the provision above made for my wife, shall be set apart and held as a separate trust fund for each of my two sons, Stanley and Norman, and two-twelfths (2-12) thereof as a fund for each of my three daughters, Maud, Laura, and Florence Josephine."

The will in substance provided for the continuance of the trust until the death of the last surviving grandchild of the testator who was living at the time of his decease. Subject to the devise to Kate Field the income from the trust estate was required to be paid in the proportions set forth in paragraph b (2) of the will to the beneficiaries named therein or to their issue per stirpes. On the termination of the trust the estate, then undistributed, was required to be divided among the beneficiaries named in paragraph b (2) of the will or to their issue per stirpes in the proportion there specified.

Said testator further provided that said trust should continue until the death of the last survivor of testator's grandchildren living at the time of his death. Said grandchildren were eleven in number at the date of the death of Kate Field, deceased. A copy of said will is attached hereto and made a part hereof as Exhibit "B."

V.

Said Kate Field, by her last will and testament, exercised the power of appointment so given her by the will of her said husband, Joseph N. Field, and as follows:

"Seventh. Under the will of my late husband, Joseph N. Field, I am given the power to dispose of the net income from one-half of a trust fund from and after the date of my death, I receiving
41 the whole of the net income from said trust fund during my life, and in the exercise of said power I do hereby direct that the income over which I have the power of appointment as aforesaid shall be paid in equal shares to my children surviving at the date of the respective payments which shall be made out of the income from said trust fund; provided, however, that the surviving issue of any deceased child shall stand in the place of and receive the share of said net income which such deceased child would have been entitled to receive if living at the date of the respective payments out of said income."

VI.

The internal revenue act of the United States of 1916, Title II, in effect September 9, 1916, as amended March 3, 1917, provided in section 201 as follows:

"That a tax (hereinafter in this Title referred to as 'The Tax') equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or nonresident of the United States:

"1½ per centum of the amount of such net estate not in excess of \$50,000.

"3 per centum of the amount by which such net estate exceeds \$50,000, and does not exceed \$150,000, etc."

Said law further provided in section 202 as follows:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

"(a) To the extent of the interest therein on the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

"(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

VII.

Said United States internal revenue act of 1916, as amended, provided in section 212 that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make such regulations and prescribe and require the use of such books and forms as he might deem necessary to carry out the provisions of said Title II. Said commissioner thereupon issued Article XI, regulations No. 37, revised May, 1917, providing as follows:

"Property passing under a general power of appointment is to be included as a portion of the gross estate of a decedent appointor."

VIII.

Said Stanley Field as executor of the estate of Kate Field, deceased, made a tentative return for estate tax to the collector of inter-

nal revenue of the United States for the first district of Illinois, and filed said return in the office of said collector on the 11th day of July, 1917; a copy of said return showed the net individual estate of Kate Field, deceased, subject to tax, amounted to the sum of \$355,011.22. A tax thereon, amounting to the sum of \$14,550.67 was duly paid by Stanley Field to said collector of internal revenue on the 11th day of July, 1917 (the actual amount in cash paid by said Stanley Field, executor, was \$13,968.65, being said sum of \$14,550.67 less the statutory discount of 5 per cent); and said executor duly received a receipt for said payment of tax from said collector. A copy of said receipt is attached hereto and made a part hereof as Exhibit "D."

Said return for estate tax so made by said Stanley Field, as executor of said estate, did not include any of the property of the estate of Joseph N. Field, deceased, held in trust as above described, or of the value of the income from said property over a portion of which said income said Kate Field, deceased, had and exercised the power of appointment above described.

IX.

And afterward the Commissioner of Internal Revenue of the United States made an investigation of the said return and of the value of the individual estate of said Kate Field, deceased, and of the value of said appointed estate, and increased the assessed value of said individual estate and fixed an assessed value on said appointed estate, and thereupon assessed an additional estate tax (over and above the amount paid as aforesaid) amounting to the sum of \$121,619.44, and the said collector of internal revenue did, on December 12, 1919, demand of said Stanley Field, executor, that he pay said additional estate tax of \$121,619.44 within thirty days thereafter.

And thereafter, in view of certain errors in the assessment of said additional tax, on January 4, 1920, said Stanley Field, executor, filed with the collector of internal revenue for the first district of Illinois, a claim for abatement, claiming an abatement in said additional tax of the sum of \$23,803.65, by reason of certain alleged errors in the assessed value so made by said commissioner.

And thereupon said Commissioner of Internal Revenue reexamined said assessed values and made certain reductions therein, so that the assessed values as finally determined by said commissioner were as follows:

Assessed value of said individual estate of Kate Field, deceased.....	\$450, 675. 69
Assessed value of said appointed estate.....	1, 449, 563. 57
Total alleged gross estate.....	\$1, 900, 239. 26
Less deductions allowed.....	78, 458. 68
Total alleged net estate.....	\$1, 821, 780. 58

And upon the alleged net value so fixed said commissioner determined that a total additional tax was due amounting to the sum of

\$120,909.58; and on February 19, 1920, H. W. Mager, then acting collector of internal revenue of the United States for the first district of Illinois, demanded of said Stanley Field, executor, as an additional estate tax, alleged to be due under said internal revenue act of the United States of 1916, Title II, the said sum of \$120,909.58, and a penalty of \$1,192.53, making a total additional tax and penalty so demanded of \$122,102.11. And said acting internal revenue collector did then and there threaten said Stanley Field, executor, in
45 the event of non-payment, with certain penalties provided by the statutes of the United States for the punishment of delinquent taxpayers.

X.

And thereafter, on February 20, 1920, said Stanley Field, executor, paid to said acting collector of internal revenue the said total sum of \$122,102.11, under written protest, a copy of which said protest is attached hereto and made a part hereof as Exhibit "E."

XI.

And thereafter, on March 3, 1920, said Stanley Field, executor, filed in the office of said acting internal revenue collector a claim for refund, claiming said amount now sued for, being the sum of \$121,059.60. Said sum of \$121,059.60 is that part of the total additional tax and interest which was assessed by said commissioner of internal revenue on the theory that that part of said trust estate of Joseph N. Field, deceased, over which said Kate Field, deceased, exercised a power of appointment, was a part of the gross estate of Kate Field, deceased, within the meaning of said internal revenue law of 1916, Title II, and does not include any part of said additional tax which was fixed on account of the increased assessment so determined by said Commissioner of Internal Revenue on the individual estate of Kate Field, deceased. A copy of said claim for refund, with a copy of the receipt thereto attached, is attached hereto and made a part hereof as Exhibit "F."

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XII.

And afterward, on, to wit, the 29th day of March, 1920, said claim for refund so filed by said Stanley Field, executor, was considered and rejected by said Commissioner of Internal Revenue.

No part of said sum of \$121,059.60 has ever been repaid to said Stanley Field, executor.

Conclusion of law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of \$121,059.60. It is therefore adjudged and ordered by the court that

the plaintiff recover of and from the United States the sum of one hundred and twenty-one thousand fifty-nine dollars and sixty cents (\$121,059.60).

47

Exhibit "A."

Last will and testament of Kate Field, deceased.

I, Kate Field, of Chicago, Ill., do make this my last will and testament as follows:

First. I direct that all claims against my estate and also all inheritance taxes, so called, be paid as soon as practicable after my death. It is my will that the bequests given herein, other than to my residuary legatees, be paid free from any deduction by reason of inheritance taxes, or any other deduction whatsoever.

Second. I give and bequeath five thousand dollars (\$5,000.00) to Mrs. Libby Bell, of Rushville, Ill.

Third. I give and bequeath two thousand dollars (\$2,000.00) to Mrs. Ida M. Eddy.

Fourth. I give to my son Stanley Field, as trustee, sixty-five hundred dollars (\$6,500.00), to be kept invested, and the net income derived therefrom to be paid to Ella Campbell for and during her life; the principal of said trust fund to go to my residuary legatees upon her death.

Fifth. I give and bequeath to each of my three sons-in-law, Henry Gordon Clegg, William G. Clegg, and Sir Kenneth Crossley, Bart., the sum of twenty-five thousand dollars (\$25,000.00).

Sixth. I give and bequeath to my niece, Grace James Gillette, the sum of five thousand dollars (\$5,000.00).

Seventh. Under the will of my late husband, Joseph N. Field, I am given the power to dispose of the net income from one-half of a trust fund from and after the date of my death, I receiving
48 the whole of the net income from said trust fund during my life, and in the exercise of said power I do hereby direct that the income over which I have the power of appointment as aforesaid shall be paid in equal shares to my children surviving at the date of the respective payments which shall be made out of the income from said trust fund; provided, however, that the surviving issue of any deceased child shall stand in the place of and receive the share of said net income which such deceased child would have been entitled to receive if living at the date of the respective payments out of said income.

Eighth. All the rest, residue and remainder of my estate I give and bequeath in equal shares to my three daughters, Maud Field Clegg, Laura Field Clegg and Josephine Field Crossley.

Ninth. I appoint my son Stanley Field executor of this my last will and testament, and direct that no bond or security be required of him as such executor.

In witness whereof I have hereunto set my hand and seal this 7th day of January, A. D. 1916.

(Signed)

KATE FIELD. [SEAL.]

The foregoing instrument was, on the day of the date thereof, signed, sealed, and declared by the said testatrix, Kate Field, to be her last will and testament, in the presence of us, who, at her request and in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

(Signed)

CHARLES E. MARTIN.

FRED H. REYNOLDS.

JAMES M. BARNES.

49

Exhibit "B."

Last will and testimony of Joseph N. Field.

I, Joseph N. Field, of Chicago, State of Illinois, do hereby make, publish and declare this my last will and testimony as follows, hereby revoking all prior wills:

First. I direct my executors to pay all just debts and claims against my estate within a reasonable time after my decease.

Second. I give, devise, and bequeath to my wife, Kate Field, in case she shall be living at the time of my death, all my right, title and interest in and to the premises in the town of Bowdon, Cheshire, England, near Manchester, known as "Ashleigh," as well as any other premises which we may be occupying as a family residence at the date of my death, and also in and to all the household furniture, books, pictures, plate, linen, horses, carriages, harnesses and contents of stable, and other personal property used in and about or in connection with the said premises above mentioned, at the time of my decease.

Third. I give and bequeath to each of my nephews, Dwight James, Howard James and Philip James, and to each of my nieces, Mrs. Grace James Gillett, Bertha Dibblee King, Frances Dibblee Sprague, Ethel Field Beatty, Minna Field Gibson and Florence Field Lindsay, provided they shall respectively be living at my death, the sum of ten thousand dollars (\$10,000.00) as a remembrance.

Fourth. I give and bequeath to my cousin, Lucy Ann Field, of New Jersey, daughter of my late uncle William Field, in case she shall be living at the time of my death, the sum of five thousand dollars (\$5,000.00).

Fifth. I give and bequeath to Paula Reif Huck, if she be living at the time of my death, the sum of ten thousand dollars (\$10,000.00).

50 Sixth. I give and bequeath to Arthur B. Jones, of Chicago, if he be living at the time of my death, the sum of ten thousand dollars (\$10,000.00).

Seventh. I give and bequeath to Mrs. Ida M. Eddy, if she be living at the time of my death, and shall not have contracted a second marriage, the sum of two thousand dollars (\$2,000.00).

Eighth. I give and bequeath to Ella Campbell, if she shall be in my employ at the time of my death, the sum of three hundred pounds sterling (£300).

Ninth. I direct that all inheritance, succession, or legacy taxes or duties be paid out of my residuary estate, so that the foregoing bequests and legacies shall be free from any deduction of such tax or duty.

Tenth. I give, devise, and bequeath unto my son, Stanley Field and Arthur B. Jones, both of Chicago, State of Illinois, and the survivor of them, and to their successors as trustees, all of the rest, residue and remainder of my property and estate, real, personal, and mixed, and wherever situated, to have and to hold upon the trusts, terms, and conditions following:

(a) Said trustees shall have full power and authority to sell, assign, transfer, and convey any and all or any part of the trust property which shall at any time form a part of the trust estate under this will and convert the same into cash at such time or times and upon such terms or conditions as to my said trustees shall seem best, and to make, execute, and deliver all deeds of conveyances and other instruments in writing as may be in the opinion of said trustees necessary or proper for the best management of said trust estate; to execute leases of any real estate which shall form a part of said trust at any time, at such rental and for such length of time, not exceeding two hundred (200) years, as they may think best.

51 They shall also have power to erect buildings or to change, alter, or make additions to any existing buildings upon any real estate forming a part of said trust estate, and also to retain any investments in real or personal property which shall come into their possession under this will as trustees, for such time as they shall deem it for the best interests of the trust so to do; and also to invest and reinvest from time to time any funds coming into their hands as trustees as aforesaid, and not paid out to beneficiaries under the provisions of this will, in such real or personal property, including stocks of corporations as shall commend themselves to the business judgment of said trustees; and to do all other acts in relation to the said trust estate or in relation to its disposition or investment which in the judgment of said trustees shall be needful or desirable to the proper and advantageous management of said trust estate, so as to protect the same and to make the same productive; it being my invention by this will to vest in my said trustees authority to do all things in regard to the said trust estate in the same manner and to the same extent as I might or could do if living, which shall seem expedient and best to them, in order to carry out the provisions and intents of this my last will and testament.

(b) The said trust shall be divided by said trustees as soon as may be after the same shall come into their possession, into separate funds, as follows:

(1) If my wife, Kate Field, shall survive me, one-third ($\frac{1}{3}$) of said trust estate shall be set apart and held as a separate trust fund for the benefit of my said wife, and the net income derived therefrom shall be paid to my wife during her life, and from and after her death the net income from one-half ($\frac{1}{2}$) of said share of said trust estate shall

be paid to such persons, and in such shares as she shall appoint by her last will and testament.

52 (2) Three-twelfths ($3/12$) of said trust estate, subject to the provision above made for my wife, shall be set apart and held as a separate trust fund for each of my two sons, Stanley and Norman, and two-twelfths ($2/12$) thereof as a fund for each of my three daughters, Maud, Laura, and Florence Josephine.

In setting apart and dividing said trust estate into the separate funds above specified, the trustees may set apart and allot undivided interests in different parts and parcels of said trust estate, and the judgment of said trustees in making said division shall be final and conclusive upon all parties in interest and said trustees may make joint investments on behalf of said separate trust funds; the several trust funds to be interested in such joint investments in proportion to their several investments therein. The net income from the several funds so created for my respective children shall be paid over to them during their respective lives, at such times and in such amounts as my trustees in their discretion may determine to be for the welfare of such respective children, but so as in any event to provide liberally for their support and maintenance, and any unexpected income shall be added to the principal of the particular fund from which the same is received. At the death of each child the payment of income shall be continued under like discretionary powers to his or her lawful issue per stirpes until the death of the last survivor of my grand children who shall be living at my death, at which date each separate trust fund then in the hands of my trustees shall be divided per stirpes among the then surviving lawful issue of the son or daughter for whom the same was held.

If at any time during the duration of the said trust there shall be a failure of lawful surviving issue of either of my said
53 children at or after his or her death, the trust fund held for such child, with its accumulations, shall then be equally divided among the remaining funds created by this paragraph, and become a part thereof; subject, however, to the qualification that each of my children dying without leaving any lawful issue surviving at the date of his or her death shall have power to dispose by last will and testament of one-third ($1/3$) of the trust fund then held for him or her, and provided further, that if the trust fund created for my son Stanley shall have been paid over to him, then the share of any trust fund which would have been added to the trust fund created for him had the same continued to be held in trust, shall be paid over and delivered to him if he shall then be living, and if he shall not then be living shall be paid over and disposed of as he shall direct by his last will and testament, and in default of any disposition thereof by his last will and testament, then to the persons who would at the date of such payment have been his heirs at law under the statutes of the State of Illinois if he had then died intestate.

It is my will and I direct that the said trustees shall convey, transfer, and pay over to my said son Stanley, at any time when he shall

make request therefor, the trust fund created for him by the foregoing provisions of this will. I also authorize and empower said trustees in their discretion to pay over to my said son Norman, upon his request, at any time or times after he shall reach the age of forty (40) years, an amount or amounts in the aggregate not exceeding one-fourth ($1/4$) of the trust fund created for him by the foregoing provisions of this will.

If either of my children should die before me, or after me but before the division of the estate into separate funds as aforesaid, leaving lawful issue, a fund shall be created for such issue, 54 consisting of the proportion of my residuary estate which would have been set apart under the foregoing provisions of this will for the parent if living.

Upon the death, resignation, refusal or inability to act, or further act, of either of the said Trustees hereinbefore named, I appoint James Simpson, of the city of Chicago, trustee, to fill the vacancy so arising, to the end that there may be at least two trustees under this will; and in the event of the said James Simpson failing for any cause to act or further act as trustee hereunder, as above provided, or in case any other vacancy in said trusteeship shall occur from any cause whatsoever, The Northern Trust Company, a corporation organized under the laws of the State of Illinois, is hereby appointed trustee and successor in trust under this will; and in any event at the expiration of ten (10) years from the date of my death the said The Northern Trust Company is hereby appointed a trustee hereunder, and the trustees for the time being acting under this will shall have and exercise equal rights and powers as such trustees, and if and when the said The Northern Trust Company shall become the sole trustee under this will by reason of the death, resignation or inability to further act of the persons hereinbefore named as trustees, or successors in trust, the said The Northern Trust Company shall have and possess all the rights, powers, duties, and authority vested in the original trustees herein named.

Said trustees shall not be required to give any bond or security for the performance of their duties as trustees, and I exempt every trustee under this will from any liability for loss occurring without his or its own wilful default, and allow him to retain, and allow his co-trustees, all such proper charges and expenses as are incidental to the trusteeship, and purchasers from the trustees shall not be holden to 55 see to the application of the purchase money. And I authorize the trustees under this will to receive a reasonable compensation for their services as such trustees, having due regard to the time and labor they may respectively contribute to the duties of their trust. If at any time in the management of any of said trust funds or estate under the charge of three trustees there shall arise any conflict or difference of opinion among the trustees, I direct that the judgment and opinion of a majority of the trustees in regard to the conduct and management of the trust funds or estate shall prevail.

If the period during which the trustees are vested with discretion in regard to the amount of the net income from the several trust funds to be paid to the several beneficiaries, the residue of such income to be accumulated, shall exceed the time allowed by law for the exercise of such discretion and accumulation, then and in every such case the right to exercise such discretion as to the amount of income paid to the beneficiaries shall continue during the period of twenty-one (21) years from and after my death and for such longer period, if any, as may be lawful, and during the residue of the term of said trust the entire net income from the several trust funds shall be paid from time to time to the respective beneficiaries who are entitled to participate therein, per stirpes.

The trustees under this will are directed to keep full and accurate books of account, showing all their transactions as such trustees, which shall at all reasonable times be open to the inspection of the beneficiaries interested in the several trusts, and on or before March 1st in each year said trustees shall furnish to each beneficiary entitled to share in the income of either of the said trusts a written statement showing the condition of the trust estate and the income received, and the disbursements and investments made by the trustees during the last preceding calendar year in connection with the trust in which such beneficiary is interested.

56 In the event of any vacancy occurring in the trusteeship not herein specifically provided for, any court of competent jurisdiction holding its session in the city of Chicago, State of Illinois, shall have power, upon the joint application in writing of all the beneficiaries hereunder, then of lawful age, to appoint the person or persons (or corporation) who shall be nominated by the said beneficiaries to be a successor or successors in trust hereunder, either with or without bond, as may be specified by request of the beneficiaries, but such power shall not be exercised so long as The Northern Trust Company is able and willing to administer the trusts hereby created, either alone or as co-trustee with one or more of the trustees hereinbefore named.

The trusts created by this will are made for the purpose of providing a suitable support and maintenance for the respective beneficiaries hereinbefore named, and such beneficiaries shall have no power to anticipate or assign the income which shall be payable to them respectively under the provisions of this will, and such income shall not be liable to be taken away from any such beneficiaries by process of law or otherwise.

Eleventh. I hereby nominate and appoint Stanley Field and Arthur B. Jones executors of this my last will and testament, and in the event of either of them failing to qualify or to act, or further act, as executor under this will, then I appoint James Simpson executor or co-executor under this will, and direct that neither of said parties be required to give bond or security as such executor.

I further direct my executors to pay over to my wife hereinbefore named one-third ($\frac{1}{3}$) of the net income received by them as

57 executors from such part of my estate as shall remain in their hands from time to time, until the same shall be turned over to the trustees hereinbefore appointed in this will.

Although I have been living in England for some years for business reasons, I have always retained my citizenship in Chicago and have never changed or intended to change my legal residence, and it is my direction that my original will be probated at Chicago, and that the principal administration of my estate be there.

In witness whereof I have hereunto set my hand and seal this eighth day of November, A. D. 1911.

JOSEPH N. FIELD. [SEAL.]

The foregoing instrument was, on the day of the date thereof, signed, sealed, and declared by the said Joseph N. Field to be his last will and testament, in the presence of us, who, at his request and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

JOHN P. WILSON.

WILLIAM B. McILVAINE.

JOHN P. WILSON, JR.

WILLIAM R. DICKINSON.

Will proved and admitted to record in open court this 11 day of Aug. A. D. 1914.

DANIEL H. GREGG, *Probate Judge.*

STATE OF ILLINOIS,

County of Cook, ss:

In the Probate Court of Cook County proved and admitted to record in open court this 11 day of August A. D. 1914.

JOHN A. CERVENKA, *Clerk.*

Filed Aug. 11, 1914.

JOHN A. CERVENKA, *Clerk.*

58 I, Joseph N. Field, do make the following codicil to my last will and testament, bearing date the eighth day of November, A. D. 1911, viz.:

I give to my son Stanley Field and my friend Arthur B. Jones, of Chicago, as trustees, the sum of five hundred thousand dollars (\$500,000.00), to be delivered to them either in cash or securities selected by my executors, at their market value, said fund to be held and used, both principal and income, for the aid and relief of persons who shall have been in the employ of Marshall Field & Company for not less than ten (10) years prior to my death, and who shall be in need of assistance by reason of sickness, age, disability, or other cause.

The time of service above specified need not be continuous, and may include service rendered as well to the copartnership as to the corporation doing business under the name of Marshall Field & Company.

The distribution of the charitable fund hereby created may, in the discretion of said trustees, extend to the aid of the families of

deceased employees who if living would have come within the class of beneficiaries above designated, in cases where such families shall be in need of aid. It is my will that the entire fund, both principal and income, be appropriated and used for the purposes above specified within twenty (20) years after my death, it being my intention to provide aid for persons (or their families) who shall have been in the employ of Marshall Field & Company during the time I have been interested in its business. It is further my will that the judgment and discretion of said trustees and their successors in trust in paying out any of said trust moneys to the members of the class of beneficiaries above designated shall not be subject to question or review.

My said trustees, and the survivor of them and their
59 successors, shall have power at any time, and from time to time, to appoint, by an instrument in writing signed by them or him, a successor or successors to fill any and all vacancies which may arise in said trusteeship, to the end that there may be two active trustees to carry out said trust.

I direct that all inheritance, succession, or legacy taxes or duties, if any, against the bequest made by this codicil be paid out of my residuary estate, so that the foregoing bequest shall be free from any payment on account of any such tax or duty.

Except as modified by this codicil, I confirm my said will.

In witness whereof I have hereunto set my hand and seal this thirty-first day of October, A. D. 1912.

JOSEPH N. FIELD. [SEAL.]

The foregoing instrument was on this thirty-first day of October, A. D. 1912, signed by the above named Joseph N. Field and declared by him to be a codicil to his last will and testament in the presence of us, who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

JOHN P. WILSON.

WILLIAM B. McILVAINE.

WILLIAM R. DICKINSON.

Codicil proved and admitted to record in open court this 11 day of Aug., A. D. 1914.

DANIEL H. GREGG, *Probate Judge.*

STATE OF ILLINOIS,

County of Cook, ss:

In the Probate Court of Cook County codicil proved and admitted to record in open court this 11 day of Aug., A. D. 1914.

JOHN A. CERVENKA, *Clerk.*

Filed Aug. 11, 1914.

JOHN A. CERVENKA, *Clerk.*

(Endorsed:) Will of Joseph N. Field. Recorded in probate documentary record of wills, book 89, page 343.

This return must be filed within one year after the day of death of the decedent whose estate is returned.

Form 706.

TO BE FILLED IN BY INTERNAL REVENUE
BUREAU.
Audited by.....

TREASURY DEPARTMENT.
INTERNAL REVENUE BUREAU.
Return for Estate Tax.
(Title II, Act of September 8, 1916.)

TO BE FILLED IN BY COLLECTOR.
Collection District.....
Assessment List....., 191

AN ITEMIZED INVENTORY OF THE PROPERTY OF EVERY KIND OWNED BY DECEDENT AT TIME OF DEATH, WITH LEGAL DEDUCTIONS.

Decedent's name, Field, Kate.
(Write family name first, given names after.)

Residence at time of death, 1550 No. State Parkway Street, Chicago,
(City or town.)

Date of death, April 29, 1917.
Illinois.
(State, Territory, or foreign country.)

NOTE.—This return is required of the estate of every nonresident of the United States, Hawaii, or Alaska leaving property or interests in the United States, Hawaii, or Alaska. This return is required of every resident's estate exceeding in gross value \$60,000 or in net value \$50,000. (See sections 202 and 203 of the act.)
PENALTIES.—1. For knowingly making false statement in this return, a fine not exceeding \$5,000, or imprisonment, or both. 2. For failure to file as required by section 205 of the act, a fine not exceeding \$500, with costs of suit. (See section 210 of the act.)

The Gross Estate.

(See section 203 of the act and Articles IV to VII of Regulations No. 37.)

NOTE.—If the decedent was a nonresident of the United States, Hawaii, or Alaska, there is to be entered in the space below only such items of the gross estate as at the time of the decedent's death were located or had their situs in the United States, Hawaii, or Alaska. All the property and interests of a resident decedent, regardless of their location or situs, are to be itemized below:

1. Real Estate.

1	2	3	4
Location.	Value at decedent's death.	Assessed valuation, current tax year.	Present market value (actual receipts if sold).
None.	0	0	0
Total.....			

2. Personal Property.

A. Stocks and bonds.

NOTE.—The final paragraph of section 202 of the act provides that for the purpose of the estate tax "stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States." All stocks and bonds of domestic corporations owned by a nonresident decedent for whose estate this return is made must be listed below:

1	2	3	4
No. of shares or bonds	Description or designation.	Market value day of decedent's death.	Actual value if no market value.
300	Commonwealth-Edison Co. (c. 132)	\$20,000	\$
30	Commonwealth-Edison Co., being fully paid subscription receipt for new stock (c. 128)	3,840	
100	Illinois Central R. R. Co. (c. 1044)	10,450	
100	Illinois Trust and Savings Bank (c. 475)	47,500	
200	Insurance Exchange Building Corporation, pfd. (c. 104)	20,000	
275	Madison Plow Company, first pfd. (c. 98)	28,400	
100	Public Service Co., of Northern Illinois, pfd. (c. 100)	10,000	
200	The Pullman Company (c. 1554)	31,100	
305	U. S. Government 3% bonds due July 1, 1917, face value \$1,000 each, (c. 100 and 101)	205,500	
	Total	395,390	

652 B. Miscellaneous personalty.—Mortgages and promissory notes, insurance payable to the estate, cash, claims in action, good will of decedent's business, decedent's vested interest in other estates, personal effects, etc.

1	2	1	2
Designation or description.	Actual value at decedent's death.	Designation of description.	Actual value at decedent's death.
Mortgages (with maturity date): None.	0	Insurance: None.	0
Notes (with maturity date): None.		Cash in banks: Account in Illinois Trust and Savings Bank	9,721.22
		Claims in action: Miscellaneous:	
Total		Total	9,721.22

C. *Transfers by deed of trust or other instruments, gifts, or sales without adequate consideration, made by decedent in contemplation of, or intended to take effect at, decedent's death.* (See paragraph b and final paragraph, section 202, of the act.)

NOTE.—If decedent was a resident of the United States, Hawaii, or Alaska, the transfers described in section 202, paragraph b, of the act are taxable regardless of the location or status at any time of the transferred property. If decedent was a nonresident, there must be itemized below such transfers described in section 202, paragraph b, as conveyed property located or situated in the United States, Hawaii, or Alaska, either at the time the transfer was made or at the time of decedent's (the transferor's) death.

1	2		3	4	5	6	7	8
	Name of transferee, donee, or beneficiary of decedent, and address.	Date of transfer.	Manner of transfer.	Kind of property transferred.	Value at time transfer.	Value at decedent's death.	Income accrued at decedent's death.	Total of columns 6 and 7.
None.					\$	\$	\$	\$
Total.....								

D. Decedent's share in joint bank accounts, or in other property owned jointly with others. (See paragraph b, section 202, of the act.)

1		2		3		4		5		6																																																	
Description.		Location.		Original value decedent's share.		Value decedent's share at decedent's death.		Income accrued at decedent's death.		Total of columns 4 and 5.																																																	
Name.																																																											
Total.																																																											
<p>Recapitulation—gross and net estate.</p> <table border="1"> <thead> <tr> <th colspan="2">Recapitulation—gross and net estate.</th> <th colspan="2">Tax due.</th> </tr> <tr> <th>Gross estate.</th> <th>Total value.</th> <th>Separate portion of net estate and rate thereupon.</th> <th>Tax.</th> </tr> </thead> <tbody> <tr> <td>1. Real estate.....</td> <td>\$ 395,290</td> <td>Portion not exceeding \$50,000.....</td> <td>14%</td> </tr> <tr> <td>2. Stocks and bonds.....</td> <td></td> <td>1. Portion \$50,000-\$150,000.....</td> <td>3 1/2%</td> </tr> <tr> <td>3. Mortgages, notes, insurance, cash, etc., insured.....</td> <td>9,721.22</td> <td>2. Portion \$150,000-\$250,000.....</td> <td>4 1/2%</td> </tr> <tr> <td>4. Transfers.....</td> <td></td> <td>3. Portion \$250,000-\$450,000.....</td> <td>6 1/2%</td> </tr> <tr> <td>5. Share in jointly owned property.....</td> <td></td> <td>4. Portion \$450,000-\$1,000,000.....</td> <td>7 1/2%</td> </tr> <tr> <td>6. Total gross estate.....</td> <td>405,011.22</td> <td>5. Portion \$1,000,000-\$2,000,000.....</td> <td>9 1/2%</td> </tr> <tr> <td>7. Total deductions.....</td> <td>50,000</td> <td>6. Portion \$2,000,000-\$5,000,000.....</td> <td>12 1/2%</td> </tr> <tr> <td>8. Net estate for tax.....</td> <td>355,011.22</td> <td>7. Portion \$5,000,000-\$10,000,000.....</td> <td>13 1/2%</td> </tr> <tr> <td></td> <td></td> <td>8. Portion exceeding \$10,000,000.....</td> <td>15 1/2%</td> </tr> <tr> <td></td> <td></td> <td>Total tax.....</td> <td></td> </tr> </tbody> </table>												Recapitulation—gross and net estate.		Tax due.		Gross estate.	Total value.	Separate portion of net estate and rate thereupon.	Tax.	1. Real estate.....	\$ 395,290	Portion not exceeding \$50,000.....	14%	2. Stocks and bonds.....		1. Portion \$50,000-\$150,000.....	3 1/2%	3. Mortgages, notes, insurance, cash, etc., insured.....	9,721.22	2. Portion \$150,000-\$250,000.....	4 1/2%	4. Transfers.....		3. Portion \$250,000-\$450,000.....	6 1/2%	5. Share in jointly owned property.....		4. Portion \$450,000-\$1,000,000.....	7 1/2%	6. Total gross estate.....	405,011.22	5. Portion \$1,000,000-\$2,000,000.....	9 1/2%	7. Total deductions.....	50,000	6. Portion \$2,000,000-\$5,000,000.....	12 1/2%	8. Net estate for tax.....	355,011.22	7. Portion \$5,000,000-\$10,000,000.....	13 1/2%			8. Portion exceeding \$10,000,000.....	15 1/2%			Total tax.....	
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* *Note.*—If decedent was a nonresident, the share of total deductions to be taken here is a proportion equal to the proportion the gross estate within the United States, Hawaii, and Alaska is of the whole gross estate, wherever situate.

Total gross estate wherever situate.....
Note.—This space to be filled in only if decedent at time of death was a nonresident of the United States, Hawaii, or Alaska.

I, Stanley Field, the undersigned executor, do hereby solemnly swear that the above statement of gross and net estate of Kate Field, the above-named decedent, is in all respects true to the best of my knowledge and belief; that letters testamentary were granted upon the said estate on the 20th day of June, 1917, by the probate court at Cook County, Illinois; that no distribution from the estate to beneficiaries has to this date been made, and that this is a tentative return of the estate.

STANLEY FIELD.

Subscribed and sworn to before me at Chicago, Ill., this 7th day of July, 1917.

WILLIAM R. DICKINSON,
Notary Public, Deputy Collector.

Exhibit "D"

Form 1. Receipt for advance payments—regular taxes. United States Internal Revenue.

Collector's Office First District of Illinois

At Chicago Date 7/11-1917

Kate Field Estate of

by Stanley Field Executor

1550 N. State Parkway

Chicago, Illinois

Form 58-----; -----

Form 23 (Year) 1917 ; (Month) July

(Year) (Month)
Estate Tax

(Description of collection, same
as in column 3, Form 58, for
Act 9/8-16 and 3/3-1917

(Unassessable items.)

\$13,968.65

Received payment July 11 1917

JULIUS F. SMETANKA,

Collector of Internal Revenue.

65

Exhibit "D-a."

Letters testamentary—Probate Court of Cook County.

STATE OF ILLINOIS,

County of Cook, ss:

The People of the State of Illinois, to all to whom these presents shall come, greeting:

Know ye, that whereas Kate Field, late of the County of Cook and State of Illinois, died on or about the 29th day of April, A. D. 1917, as it is said, after having duly made and published her last will and testament, leaving at the time of her death property in this State, which may be lost, destroyed or diminished in value, if speedy care be not taken of the same; and inasmuch as it appears that Stanley Field has been appointed executor in and by the said last will and testament, to execute the same, and to the end that said property may be preserved for those who shall appear to have a legal right or interest therein, and that the said will may be executed according to the request of the said testatrix we do hereby authorize him, the said Stanley Field as such executor to collect and secure all and singular the goods and chattels, rights, and credits which were of

the said Kate Field at the time of her decease, in whosoever hands or possession the same may be found, in this State, and well and truly to perform and fulfill all such duties as may be enjoined upon him by the said will, so far as there shall be property, and the law charge him and in general to do and perform all other acts which now or hereafter may be required of him by law.

Witness John A. Cervenka, clerk of the Probate Court of said County of Cook, and the seal of said court, this 20th day of June, A. D. 1917.

JOHN A. CERVENKA, *Clerk.*

66 STATE OF ILLINOIS,
County of Cook, ss:

I, John F. Devine, clerk of the Probate Court of Cook County, in the State aforesaid, do hereby certify that the within is a true and correct copy of letters testamentary issued on the 20th day of June, A. D. 1917, to Stanley Field, now in force, as it appears from the originals on file, and from the records of the Probate Court in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Probate Court, at Chicago, in said county, this 3d day of May, A. D. 1920.

JOHN F. DEVINE, *Clerk.*

Exhibit "E."

FEBRUARY 19, 1920.

H. W. MAGER, Esq.,
*Acting Collector, U. S. Internal Revenue,
Treasury Department, Chicago, Ills.*

DEAR SIR: I hand you herewith certified check for the sum of \$122,102.11 as payment for additional estate tax, with interest, determined by the Government in the case of Kate Field, deceased.

In paying this amount I do so under protest and compulsion, contending as I do that this tax is not justifiable under the laws of the United States or the regulations of the Treasury Department; that it is a tax assessed on the property in the estate of Joseph N. Field, over which Kate Field exercised a power of appointment, and that such tax is not justifiable under the law that was in force on April 29th, 1917, the date of the death of the said Kate Field. I further protest and contend that such tax has not properly been computed for the reason set forth in my claim for refund heretofore filed.

Yours, very truly,

(Signed)

STANLEY FIELD,
Executor.

67

Exhibit "F."

(Treasury Department, U. S. Internal Revenue, Form 46.)

Claim for refund.—Taxes erroneously or illegally collected. Also amounts paid for stamps used in error or excess.

STATE OF ILLINOIS,
County of Cook, ss:

(IMPORTANT.—This claim should be forwarded to the Collector of Internal Revenue to whom the tax was paid and must be accompanied by collector's receipt therefor.)

STANLEY FIELD,
As Executor of Estate of Kate Field, Deceased,
112 West Adams St., Chicago, Illinois.

This deponent being duly sworn according to law deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to the claim are true and complete:

1. Business engaged in by claimant: Executor estate Kate Field, deceased.
2. Character of assessment or tax: Additional estate tax.
3. Amount of assessment or stamps----- \$122,102. 11
4. Amount now asked to be refunded (or such greater amount as is legally refundable)----- 121,059. 60
5. Date of payment of assessment or purchase of stamps, February 19, 1920.

Deponent verily believes that the amount stated in Item 4 should be refunded, and claimant now asks and demands refund of said amount for the following reasons:

68 The above amount of \$121,059.60 now claimed on refund is that part of the total additional tax of \$122,102.11 paid on February 19th, 1920, which has been assessed by the Government on the estate of Kate Field, deceased, on the theory that that part of the trust estate of Joseph N. Field, deceased, over which Kate Field, deceased, exercised a power of appointment, was a part of the gross estate of Kate Field, deceased, within the meaning of the estate tax law.

The total value of the individual estate of Kate Field, deceased, as finally determined on review by the Commissioner of Internal Revenue, was \$450,675.69, from which deductions of \$78,458.68 were allowed, leaving a net individual estate subject to tax of \$372,217.01. The tax computed upon this sum is \$15,583.02, or \$1,032.35 in excess of the amount acknowledged by the Commissioner of Internal Revenue to have been paid on the first return. Interest at 10% for thirty-six days (the period of the penalty) on this sum of

\$1,032.35 amounts to \$10.16, making a total of \$1,042.51 as an additional tax on the individual estate of Kate Field, deceased, determined by the Commissioner of Internal Revenue to be due because of increased assessed values on said individual estate. Therefore, said amount of \$1,042.51 is not claimed on this refund, but the difference between said sum and the total additional tax of \$122,102.11, or \$121,059.60, represents the tax fixed by the Commissioner of Internal Revenue, as aforesaid, on the estate of Kate Field, deceased, on the theory that that part of the trust estate of Joseph N. Field, deceased, over which said Kate Field, deceased, exercised a power of appointment was a part of the gross estate of said Kate Field, deceased, within the meaning of the United States internal revenue law of 1916, as amended March 3rd, 1917, title 2; and said amount of \$121,059.60 is therefore claimed on refund.

69 It is contended by this claimant that no part of the Joseph N. Field, deceased, estate, over which said Kate Field had and exercised her power of appointment is or ought to be construed as a portion of the gross estate of said deceased appointor Kate Field, within the terms of said internal revenue law of 1916, title 2, as amended; and that therefore no tax is due or collectible upon the estate as passing or to pass pursuant to the exercise of said power of appointment, and that said law did not authorize the assessment or collection of said tax, and said tax was paid under written protest.

And this deponent further alleges that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented, except as stated herein, for the refunding of the whole or any part of the amount stated in Item 3.

[NOTARIAL SEAL.]

Sworn to and subscribed before me this 3rd day of March, 1920.

(Signed) STANLEY FIELD,

Executor of Estate of Kate Field, deceased.

/s/ FRED M. OUTHOUSE, *Notary Public.*

(Name.)

(Title.)

(This affidavit may be sworn to before an deputy collector of internal revenue without charge.)

Filed March 4, 1920, 10 a. m., in internal revenue office, Chic.

70 Receipt attached to claim for refund as follows:

(Copy)

(Treasury Department, U. S. Internal Revenue. Form 803.)

ESTATE TAX RECEIPT.

Executor's copy (in duplicate.)

Collector First District of Illinois. At Chicago, Ill. Date Feb. 19, 1920.

NOTE.—Payment of the tax indicated by the return on Form 706 is not conclusive as to ultimate tax liability. An investigation will be conducted to verify the accuracy of the return. If tax in excess of the amount indicated by the return is disclosed and one year and 180 days have elapsed since the date of decedent's death, interest will attach at the rate of 10 per centum per annum on and after the expiration of 30 days from receipt of notice of such excess tax. Section 407, Revenue Act of 1918.

Estate of Kate Field, deceased.

STANLEY FIELD,

219 W. Adams Street, Chicago, Ill.

Received payment, Feb. 20, 1920.

H. H. MAGER,

By

Acting Collector of Internal Revenue First District Illinois.

List 23A Feb. -----

Month.

Date of death, April 29, 1917 -----

Tax according to return, \$1 -----

Interest 6% -- days ----- \$ -----

----- % penalty -----

\$ ----- Balance of

tax according to Commissioner's noti-

fication ----- \$120,900.58

Int. 10% 10 days ----- 1,192.53

Total ----- 122,102.11

Received payment,

Paid under protest,

Collector of Internal Revenue.

71

VII. JUDGMENT OF THE COURT.

At a Court of Claims held in the city of Washington, on the 28th day of June, A. D. 1920, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises find in favor of the plaintiff, and do order, adjudge, and decree that the plaintiff herein, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of one hundred and twenty-one thousand, fifty-nine dollars and sixty cents (121,059.60).

BY THE COURT.

VIII. DEFENDANT'S APPLICATION FOR AND ALLOWANCE OF AN APPEAL.

From the judgment rendered in the above-entitled cause on the 28th day of June, 1920, in favor of claimant, the defendants, by their Attorney General, on the 30th day of June, 1920, make application for, and give notice of, an appeal to the Supreme Court of the United States.

FRANK DAVIS, JR.,
Assistant Attorney General.

Filed June 30, 1920.

Allowed.

EDWARD K. CAMPBELL,
Chief Justice.

June 30, 1920.

72

Court of Claims.

STANLEY FIELD, AS EXECUTOR OF THE ESTATE OF KATE	} No. 34595.
Field, deceased,	
vs. THE UNITED STATES.	

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the opinion of the court on demurrer; of the submission of the case on agreed statement of facts; of the findings of fact and conclusion of law filed by the court, with the exhibits therein referred to; of the judgment of the court; of the application of the defendants for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington city, this second day of July, A. D. 1920.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

[SEAL.]

(Indorsement on cover :) File No. 27799. Court of Claims. Term No. 442. The United States, appellant, vs. Stanley Field, as executor of the estate of Kate Field, deceased. Filed July 10th, 1920. File No. 27799.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES, APPELLANT,	} No. 442.
v.	
STANLEY FIELD, AS EXECUTOR OF THE estate of Kate Field, deceased.	

APPEAL FROM THE COURT OF CLAIMS.

MOTION TO ADVANCE.

Comes now the Solicitor General, on behalf of the appellant, and respectfully moves the advancement of the above-entitled cause for early hearing during the October, 1920, term of this court.

The question presented involves the interpretation of sections 201 and 202 of the act of September 8, 1916, entitled "An act to increase the revenue, and for other purposes." (39 Stat., c. 463, pp. 756, 777-778.)

The precise question involved is the liability to the Federal inheritance tax of property passing under a power of appointment. The same question is involved in a number of cases pending in the lower courts and is constantly arising in matters pending before the Commissioner of Internal Revenue. Very

large amounts of taxes depend upon the determination of the question. It is of very great importance to the proper and orderly administration of the law that the question be determined at the earliest possible moment. December 6, next, is respectfully suggested as the time at which the case may be heard.

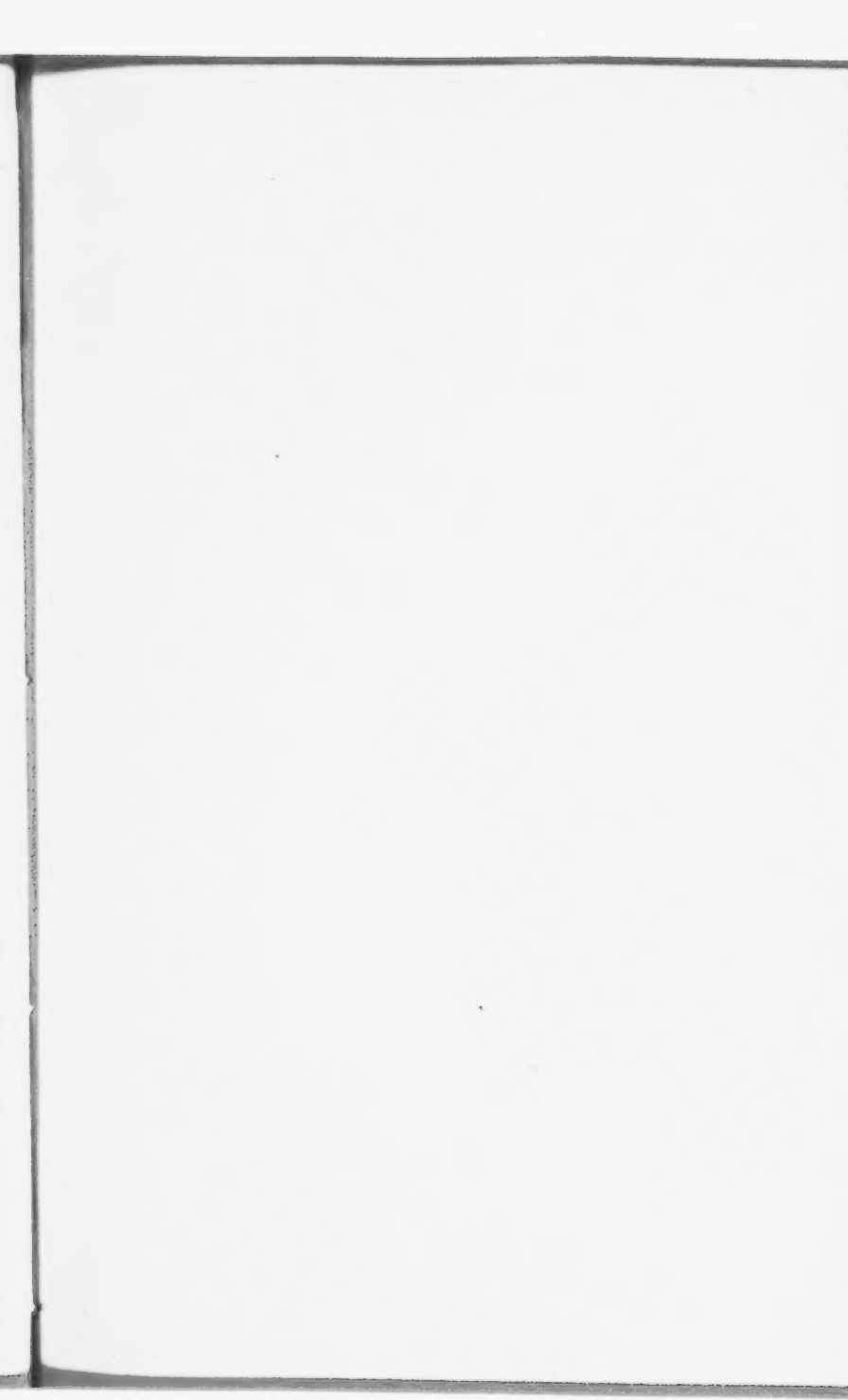
Counsel for appellee concurs in this motion.

Respectfully,

WILLIAM L. FRIERSON,
Solicitor General.

OCTOBER, 1920.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES, APPELLANT,	} No. 442.
v.	
STANLEY FIELD, AS EXECUTOR OF THE estate of Kate Field, deceased.	

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from judgment of the Court of Claims. The question presented is whether or not the United States internal revenue act of 1916 (39 Stat., chap. 463, p. 756) renders taxable an estate passing under testamentary execution of a general power of appointment created prior but exercised subsequent to the passage of the act.

On November 8, 1911, Joseph N. Field, a citizen of Illinois, duly executed his last will and testament. After providing for certain specific legacies, he devised the residue of his estate to trustees, who were required to divide it into six separate trust funds. He named his wife as beneficiary of one such fund, comprising one-third of the trust estate. The testator

further gave to his wife, Kate Field, general power of appointment by will over one-half of the net income from the trust fund created for her benefit. The provisions of will creating such trust funds, together with the power of appointment, were as follows (record, p. 9):

(b) The said trust shall be divided by said trustees as soon as may be after the same shall come into their possession, into separate trust funds, as follows:

(1) If my wife, Kate Field, shall survive me one-third ($\frac{1}{3}$) of said trust estate shall be set apart and held as a separate trust fund for the benefit of my said wife, and the net income derived therefrom shall be paid to my wife during her life, and from and after her death the net income from one-half ($\frac{1}{2}$) of said share of said trust estate shall be paid to such persons, and in such shares, as she shall appoint by her last will and testament.

(2) Three-twelfths ($\frac{3}{12}$) of said trust estate, subject to the provision above made for my wife, shall be set apart and held as a separate trust fund for each of my two sons, Stanley and Norman, and two-twelfths ($\frac{2}{12}$) thereof as a fund for each of my three daughters, Maud, Laura, and Florence Josephine.

The will (record, pp. 9-14) in substance provided for the continuance of the trust until the death of the last surviving grandchild of the testator who was living at the time of his decease. Subject to the devise to Kate Field the income from the trust estate was required to be paid in the proportions

set forth in paragraph *b* (2) of the will to the beneficiaries named therein or to their issue *per stirpes*. On the termination of the trust the estate, then undistributed, was required to be divided among the beneficiaries named in paragraph *b* (2) of the will or to their issue *per stirpes* in the proportion there specified.

Joseph Field died April 29, 1914, and his will was duly probated in the Probate Court of Cook County, Illinois.

On January 7, 1916, Kate Field, a citizen of Illinois, the wife of Joseph Field, duly made her last will and testament, wherein she executed the power of appointment given her by the will of Joseph Field, as follows:

Seventh. Under the will of my late husband, Joseph N. Field, I am given the power to dispose of the net income from one-half of a trust fund from and after the date of my death, I receiving the whole of the net income from said trust fund during my life, and in the exercise of said power I do hereby direct that the income over which I have the power of appointment as aforesaid shall be paid in equal shares to my children surviving at the date of the respective payments which shall be made out of the income from said trust fund; provided, however, that the surviving issue of any deceased child shall stand in the place of and receive the share of said net income which such deceased child would have been entitled to receive if living at the date of

the respective payments out of said income.
(Rec., p. 7.)

Kate Field died April 29, 1917, and her will was duly probated in the Probate Court of Cook County, Ill. The collector of internal revenue, acting under the internal revenue act of 1916 and the regulations issued thereunder by the Commissioner of Internal Revenue, included as part of the gross estate of Kate Field the appointed estate passing under the execution by her of the general power of appointment given her by the will of Joseph Field, and proceeded to assess and collect over protest an inheritance tax on the net value thereof.

On failure to secure subsequent reimbursement through appropriate departmental procedure, the appellee, as executor of Kate Field's last will and testament, filed suit in the Court of Claims for the recovery of the tax paid.

On defendants' demurrer to plaintiff's petition (record, p. 26) the court held that the appointed estate was not taxable under the act of 1916 (record, p. 27), and upon subsequent submission of the case upon an agreed statement of fact (record, p. 29) the court reaffirmed its conclusions of law and rendered judgment for plaintiff in the sum of \$121,059.60 for the tax thus held to be improperly collected. From this judgment the United States appeals.

SPECIFICATIONS OF ERROR.

The appellants submit that the court erred in the following particulars:

I. The appointed estate was taxable under the proper construction of paragraph *b*, section 202, of the act, inasmuch as the testamentary exercise of the power of appointment effected "a transfer * * * intended to take effect in possession or enjoyment" at or after the death of the appointor, Kate Field.

II. Such estate was also taxable under the proper construction of paragraph *a* of such section, inasmuch as the estate was subject to the payment of the charges against the estate of the appointor and to the expenses of its administration, and was also subject to distribution as part of her estate, so popularly understood.

ARGUMENT.

I.

Internal revenue act of 1916 and the legislative intent in regard thereto.

The internal revenue act of September 8, 1916 (39 Stat., pt. 1, ch. 463, p. 756), provides (sec. 201, *id.* p. 777)—

that a tax * * * is hereby imposed on a transfer of the net estate of every decedent dying after the passage of this act * * *.

(For full text of Title II thereof relating to the estate tax, see Appendix I.)

The net estate is determined by subtracting from the gross estate of such decedent allowable deductions and exemptions enumerated in section 203 of the act. The gross estate is defined by the act as follows:

SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. (This act was amended October 3, 1917, 40 Stat. L., Pt. I, Sess. I, ch. 63, p. 324, and was repealed

by act of February 24, 1919, 40 Stat. L., Pt. I, Sess. III, ch. 18, p. 1057, sec. 1400, p. 1149.)

This section was construed by the Treasury Department, to whom the execution of the law was entrusted, as included in the gross estate of decedent's property passing under testamentary execution of the latter's general power of appointment. (Regulations No. 37, revised May, 1917, Art. XI, Appendix II, and Rec., p. 31.) This contemporaneous construction of the law by the executive department called upon to carry it into effect is of itself entitled to great respect.

U. S. v. Pugh, 99 U. S., 265, 269.

U. S. v. Johnston, 124 U. S., 236, 253.

The propriety of such construction is made manifest by reference to the revenue act of 1918, approved February 24, 1919. (40 Stat. L., Pt. I, Sess. III, ch. 18, p. 1096; for full text of Title IV thereof relating to estate tax, see Appendix III.) This act which is in *pari materia* with the 1916 act here under consideration may be referred to for aid in construing it. (*U. S. v. Freeman*, 3 How., 557, 564.) Paragraph c, section 402 thereof (40 Stat. L., 1097), provides in terms for inclusion in a decedent's gross estate of "any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth." The explanation of this specific provision,

found in the report of the Ways and Means Committee of September 3, 1918, demonstrates the legislative intent regarding the 1916 act. The portion of such report pertinent to the present inquiry (House Document No. 1267, p. 101) is:

TITLE IV.—ESTATE TAX.

Congress for the first time by the revenue act of September 8, 1916, levied a tax (a graduated tax) upon the transfer of the net estate of a decedent. In determining the net estate an exemption of \$50,000 is allowed * * *.

The present bill provides for the imposition of a tax which will take the place of that imposed by Title II of the revenue act of 1916 as amended March 3, 1917, and the tax imposed by Title IX of the revenue act of 1917.

Section 402 of this bill, which takes the place of section 202 of the original act, has been revised so as to contain a provision specifically including in the gross estate dower, curtesy, or any estate created in lieu of dower or curtesy * * *.

There has also been included in the gross estate the value of property passing under a general power of appointment. *This amendment as well as that preceding is for the purpose of clarifying rather than extending the existing statute.* A person having a general power of appointment is, with respect to disposition of the property at his death, in a position not unlike that of its owner. The possessor of

the power has full authority to dispose of the property at his death, and there seems to be no reason why the privilege which he exercises should not be taxed in the same degree as other property over which he exercises the same authority. The absence of a provision including property transferred by power of appointment makes it possible, by resorting to the creation of such a power, to effect two transfers of an estate with the payment of only one tax.

From this it is manifest that the intent of Congress in enacting the 1916 act was to include in the gross estate of a decedent, such as Mrs. Field, property passing under the latter's testamentary exercise of a general power of appointment. This intent was sufficiently expressed in the general language of section 202 of the act, either paragraph of which it is submitted is broad enough to cover such a case.

II.

The testamentary execution by a donee of a general power of appointment effects a transfer of the appointed estate within the meaning of paragraph (b), section 202 of the act.

The language of the act (sec. 202) pertinent to a consideration of this phase of the case is:

that the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated: * * * (b) to the extent of

any interest therein of which the decedent has at any time made a transfer * * * intended to take effect in possession or enjoyment at or after his death * * *.

The common-law fiction regards the donor of a power as the source of title to an appointed estate, but it is submitted that the donee's execution of the power is a transfer of such estate when such execution is requisite to pass title to the appointees.

In *Chanler v. Kelsey, Comp.* (205 U. S., 466), the question determined was that the New York inheritance-tax law of 1897, taxing a testamentary exercise of a power of appointment created prior thereto, was not in contravention of the fourteenth amendment to the Constitution prohibiting taking property without due process of law. The plaintiff's contention was that the estate taxed was derived from the deeds of William B. Astor, deceased, which created the power of appointment and which were executed prior to the passage of the act and not from the will of Laura A. Delano, deceased, who exercised such power subsequent to the passage of the act. Being so derived plaintiffs contended that the estate had vested prior to the passage of the act in question, and that the statute could not, for purposes of taxation, "deem" a transfer that which was not a transfer without contravening the fourteenth amendment to the Constitution. It was essential, therefore, to ascertain whether as a matter of law the appointed estate vested in the appointees on the creation of the

appointed estate, or whether the execution of the power effected the transfer thereof.

(See brief of plaintiffs in error in such case, No. 240, argued March 14, 1907; decided April 15, 1907, pp. 42 and 44 to 47, inclusive.)

Mr. Justice Day, delivering the opinion of the court, said (pp. 473, 474):

However technically correct it may be to say that the estate came from the donor and not from the donee of the power, it is self-evident that it was only upon the exercise of the power that the estate in the plaintiffs in error became complete. Without the exercise of the power of appointment the estates in remainder would have gone to all in the class named in the deeds of William B. Astor. By the exercise of this power some were divested of their estates and the same were vested in others. It may be that the donee had no interest in the estate as owner, but it took her act of appointment to finally transfer the estate to some of the class and take it from others.

Notwithstanding the common-law rule that estates created by the execution of a power take effect as if created by the original deed, for some purposes the execution of the power is considered the source of title. It is so within the purpose of the registration acts. A person deriving title under an appointment is considered as claiming under the donee within the meaning of a covenant for quiet enjoyment. (2 Sugden on Powers, 3d ed., 19.)

So on an issue to try whether the plaintiff was entitled by two writings, or any other, purporting a will of J. S., and the evidence was of a feoffment to the use of such person as J. S. should appoint by his will, in which case it was contended that the devisees were in by the feoffment and not by the will, the court held that this was only *fictione juris*, for that they were not in *without* the will, and therefore that was the principal part of the title, and such proof was good enough and pursuant to the issue, and a verdict was accordingly given for the plaintiff. (2 Sugden on Powers, 19, citing *Bartlett v. Ramsden*, 1 Keb. 570.)

So, in the present case, the plaintiffs in error are not in *without* the exercise of the power by the will of Mrs. Delano.

This decision has been cited with approval in *Luques Appellant* (114 Me. 235-340) and has been followed in *Minot v. Treasurer & Receiver General* (207 Mass. 588). Its fundamental principle, viz, the donee of a power transfers the estate on the execution of the power, is recognized in *McFall v. Kirkpatrick* (236 Ill. 281-306).

In the present case, it will be observed that the testamentary execution of the power by Kate Field passed to the beneficiaries equal shares in the appointed estate. Had she not executed the power, the same beneficiaries would have participated in the estate by reason of the will of Joseph Field, but they would have taken different shares. By the latter's will his sons or their issue *per stirpes* would

each have received three-twelfths of the estate and his daughters or their issue *per stirpes* would each have received two-twelfths of the estate. Both the reasoning and the language of Mr. Justice Day, above, is applicable to this partial investiture and divestiture of the estate. "By the exercise of this power were some divested of their estates, and the same were vested in others. It may be that the donee had no interest in the estate as owner, but it took her act of appointment to finally transfer the estate to some of the class and take it from others." As the court there concludes, the beneficiaries are not in *without* the exercise of the power of the will of Mrs. Field. Such being the case, it follows that the execution of the power by Mrs. Field was a transfer of the appointed estate. This transfer, being by her last will and testament, clearly was intended to take effect in possession and enjoyment on the testatrix's death.

III.

The appointed estate is taxable under paragraph (a) of section 202 of the act.

The act of 1916 provides:

SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of

the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

It is essential, therefore, to determine whether the estate passing under the execution by Kate Field of her power of appointment was subject to her debts, and was subject to distribution as part of her estate.

(a) **An appointed estate is subject to the payment of debts of a deceased appointor.**

It is a well-recognized rule of law that an estate passing under the execution of a general power of appointment is subject to the payment of debts of the donee of the power.

- 2 *Sugden on Powers*, c. 8, par. 7, p. 29.
- Brandeis v. Cochrane*, 112 U. S. 344-352.
- Knowles v. Dodge*, 12 D. C. (1 Mackey) 66.
- Duncanson v. Manson*, 3 D. C. App. 260-272.
- Clapp v. Ingraham*, 126 Mass. 200.
- Johnson et al. v. Cushing*, 15 N. H. 298.
- Talmadge v. Sill*, 21 Barb. 34.
- Rogers v. Hinton*, 62 N. C. 101.
- 4 *Kent's Comm.*, sections 339-340.
- 22 *Am. & Eng. Encyc. of Law* (2d ed.), 1147.

A general power of appointment is one which the donee of the power can exercise in favor of such person or persons as he pleases. (*Farwell on Powers*, 2d ed. 7.)

The power of appointment given Kate Field by the will of Joseph Field and duly exercised by her was unlimited as concerns the person or persons whom she might appoint. Such power was therefore a

general power and the estate passing by testamentary execution thereof was subject to the payment of Kate Field's debts.

(b) For purposes of taxation, appointment of property under the power is a distribution of such property as part of the appointor's estate.

The common law regards the donor of a power as the source of title to an appointed estate. This rule, however, is only a fiction, which has been disregarded when either its justice and utility were not apparent. (*Chanler v. Kelsey, Compt., supra.*)

The present case is not concerned with maintenance or disturbance of rules of property but merely with the construction of an inheritance tax law. The words of the act in question "distribution as part of his estate" (sec. 202, par. a) are words in common use and are therefore to be given their popular meaning (26 *Am. and Eng. Encyc. of Law*, 605). It is submitted that a popular interpretation of this language would include in the estate of a deceased testatrix property over which she enjoyed substantially all the incidents of ownership and of which she disposed at her death. The donee of a power, such as Mrs. Field, possesses and exercises such rights and powers in relation to the appointed estate.

As was said by the Ways and Means Committee (House Document No. 1267, p. 101):

A person having a general power of appointment is, with respect to disposition of the property at his death, in a position not unlike

that of its owner. The possessor of the power has full authority to dispose of the property at his death, and there seems to be no reason why the privilege which he exercises should not be taxed in the same degree as other property over which he exercises the same authority.

Here it was the donee of the power, Mrs. Field, who enjoyed the estate during her life and had absolute power of disposal at her death. (*Minot v. Treasurer and Receiver*, 207 Mass. 588-591.)

It has been intimated that during her life the estate subject to the power is subject to the lien of judgments against such donee. (*Brandeis v. Cochrane*, 112 U. S. 344-352, commenting on ch. 77, secs. 1 and 3, Hurd's Ill. Rev. Statutes, 1917.)

It was she whose act "turned the course of ownership," "by whose act alone any future interest could be brought into existence." (*McFall v. Kirkpatrick*, 236 Ill. 281-306.)

On execution of her power of appointment, the appointed estate became liable for her debts (4 *Kent's Comm.*, 339; *Talmadge v. Sill*, 21 Barb. 34-51 and cases heretofore cited); and it has been suggested that such an estate is liable therefor, though the donee does not execute the power (*Duncanson v. Manson*, 3 D. C. App. 260-273).

On the donee's death, her executors were entitled to administer the appointed estate as part of her assets. (*Olney v. Balch*, 154 Mass. 318.)

She was regarded as the source of title within the purposes of registration acts and within the meaning

of covenants for quiet enjoyment. (*Chanler v. Kelsey, Comp.*, 205 U. S. 466 *Scrafton v. Quincy*, 2 Ves., Sr. 413; 2 *Sugden on Powers* (3d ed.), sec. 19.)

These incidents of ownership caused the Supreme Court of Massachusetts to say, after restating the fiction of source of title, "in many particulars the donee is often more directly responsible for the possession and enjoyment of the beneficiary than the donor." * * * "His (the donee's) relation to it (the appointed estate) is very much like that of any owner." (*Minot v. Treasurer and Receiver General*, 207 Mass. 588-590.)

Thus the Supreme Court of New Hampshire has said in *Johnson et al. v. Cushing* (15 N. H. 298, pp. 307, 308):

Where the owner of property, who has the right to dispose of it in such manner and under such limitations as he pleases, confers upon another the general power of making such disposition of it as *he* pleases, or, in other words, invests him with all the attributes of ownership over it, and that other accepts the power thus tendered to him, and undertakes to exercise dominion over the subject matter, as if he was an owner; the original proprietor, having authorized the other to treat it as if it was the property of the latter, by exercising all the power over it which he could exert if it were actually his property; and he having undertaken to treat it as if it was his property, by making a disposition of it under such a power; a court of equity may well do what the parties have

done, that is, treat it as the property of the appointer, and make it subject to the incidents attending such property. The court in such case do no more than to treat it as the property of the party, who, by the express authority of the owner, has the power and right to treat it as if it were his property, and who undertakes so to do.

Chief Baron Pollock, while recognizing the purely technical distinction between an estate in fee and an estate for life coupled with a general power of appointment, stated in *Attorney General v. Upton, and others* (1 Law Rep. Exchequer Cases (1865, 1866), p. 224 at p. 229):

In substance the interest is the same, in power of enjoyment and in power of disposition; but there is a real distinction in the fact that the owner of a life interest coupled with a power must, in order to secure the fee to his heirs, actually exercise the power; otherwise it will pass to those to whom it is limited in default of appointment. If, however, he does exercise the power, he is in substance doing the same thing as if he conveyed a fee vested in himself.

In the case cited another distinguished English Judge, Baron Bramwell, was of the opinion that in questions of taxation the fiction of source of title being only a *fiction* should not be permitted to contradict the fact. One of the questions considered was the identity of the person from whom an appointed estate was "derived" within the meaning of the succession duty act (16, 17, Vict. c. 51).

Bramwell, B., said (p. 211):

From whom, then, is the interest derived? As I said in *Barber's case* (1), these are ordinary English words, and ought to be construed by lawyers as ordinary Englishmen would construe them. Now, not one man in a hundred would say that this interest was derived from Admiral Fitzhawe (the donor) or from any other person than the donee of the power. I do not mean to deny or attempt to cast any doubt on the rule of law that an appointee takes his estate from the donor of the power, but I say that it is a rule not applicable to the construction of this statute, and it is not true, as is supposed, that there is any decision of the House of Lords to the contrary.

Mr. Justice Day, commenting on this said (*Chamber v. Keloy, Comp.*, 205 U. S. 406, p. 420):

The learned judge seems to have gone further, as to section 2, than his brethren were willing to. (*Attorney General v. Mitchell*, L. R. 6 Q. B. D. 545.) His observations are nevertheless suggestive.

In the language of Baron Bramwell, the words of the statute under consideration are ordinary English words and should be construed as ordinary English-speaking people would construe them.

To pursue this train of thought, let us inquire whose estate is distributed in the understanding of the ordinary man, when a power of appointment is exercised by the will of a life tenant of property subject to the power. Is it the estate of the donee of the power who enjoyed it during her life; who had absolute power of disposition over it at her death; who

did dispose of it; who subjected it to the payment of her debts; whose executors were entitled to administer it; who was regarded as the grantor so far as concerns registration acts or covenants for quiet enjoyment; whose relation to the estate is admitted by the courts as "very much like that of any owner"; who was invested "with all the attributes of ownership"; whose title is "in substance * * * the same" as ownership? It is submitted that there is not one man in a hundred but will say that the appointed property was distributed as part of the estate of such person.

The question then arises whether this practical and popular construction of the act—a construction intended and approved by Congress—shall be defeated by "a matter of legal technical expression" (Bramwell, B., in *Attorney General v. Upton*, *supra*) which has been recognized for three centuries to be only a fiction. (*Bartlett v. Ramsden*, 1 Keb. 570, cited in *Chanler v. Kelsey*, *supra*). It is submitted that the substance is not to be destroyed by a shadow and that the legislative intent is not to be defeated by a fiction.

CONCLUSION.

In conclusion, it is submitted that the legislative intent was to render taxable appointed estates.

Such intent was adequately expressed by the general language of the act and is controlling.

The testamentary execution of a power of appointment is a transfer intended to take effect at the appointor's death within the meaning of paragraph b, section 202.

Furthermore, property passing under the execution of a general power is liable for the deceased appointor's debts and for the expenses of the administration of her estate, and is also subject to distribution as part of her estate as popularly understood and as intended by the legislature. Such property is therefore taxable under par. (a), sec. 202.

Under any or all of these interpretations of the act which give effect to the legislative intent, appointed estates may be taxed, and it follows that in the present case the tax complained of was properly levied.

The judgment of the Court of Claims should therefore be reversed and judgment should be entered for the United States.

Respectfully submitted.

WM. L. FRIERSON,
Solicitor General.

FRANK DAVIS, JR.,
Assistant Attorney General.

T. K. SCHMUCK,
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October 1920.



APPENDIX I.

An Act To increase the revenue, and for other purposes
(approved September 8, 1916).

[39 Stat., Pt. I, chap. 463, pp. 756, 777, et seq.]

TITLE II.—ESTATE TAX.

SEC. 200. That when used in this title—

The term “person” includes partnerships, corporations, and associations;

The term “United States” means only the States, the Territories of Alaska and Hawaii, and the District of Columbia;

The term “executor” means the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent; and

The term “collector” means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more than one district, then the collector of internal revenue at Baltimore, Maryland.

SEC. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or nonresident of the United States:

One per centum of the amount of such net estate not in excess of \$50,000;

Two per centum of the amount by which such net estate exceeds \$50,000 and does not exceed \$150,000;

Three per centum of the amount by which such net estate exceeds \$150,000 and does not exceed \$250,000;

Four per centum of the amount by which such net estate exceeds \$250,000 and does not exceed \$450,000;

Five per centum of the amount by which such net estate exceeds \$450,000 and does not exceed \$1,000,000;

Six per centum of the amount by which such net estate exceeds \$1,000,000 and does not exceed \$2,000,000;

Seven per centum of the amount by which such net estate exceeds \$2,000,000 and does not exceed \$3,000,000;

Eight per centum of the amount by which such net estate exceeds \$3,000,000 and does not exceed \$4,000,000;

Nine per centum of the amount by which such net estate exceeds \$4,000,000 and does not exceed \$5,000,000; and

Ten per centum of the amount by which such net estate exceeds \$5,000,000.

SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; and

(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

For the purpose of this title stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (b) of this section, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust or at the time of the decedent's death.

SEC. 203. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mort-

gages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

(2) An exemption of \$50,000;

(b) In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States that proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated. But no deductions shall be allowed in the case of a nonresident unless the executor includes in the return required to be filed under section two hundred and five the value at the time of his death of that part of the gross estate of the nonresident not situated in the United States.

SEC. 204. That the tax shall be due one year after the decedent's death. If the tax is paid before it is due a discount at the rate of five per centum per annum, calculated from the time payment is made to the date when the tax is due, shall be deducted. If the tax is not paid within ninety days after it is due interest at the rate of ten per centum per annum from the time of the decedent's death shall be added as part of the tax, unless because of claims against the estate, necessary litigation, or other unavoidable delay the collector finds that the tax can not be determined, in which case the interest shall be at the rate of six per centum per annum from the time of the decedent's

death until the cause of such delay is removed, and thereafter at the rate of ten per centum per annum. Litigation to defeat the payment of the tax shall not be deemed necessary litigation.

SEC. 205. That the executor, within thirty days after qualifying as such, or after coming into possession of any property of the decedent, whichever event first occurs, shall give written notice thereof to the collector. The executor shall also, at such times and in such manner as may be required by the regulations made under this title, file with the collector a return under oath in duplicate, setting forth (a) the value of the gross estate of the decedent at the time of his death, or, in case of a nonresident, of that part of his gross estate situated in the United States; (b) the deductions allowed under section two hundred and three; (c) the value of the net estate of the decedent as defined in section two hundred and three; and (d) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

Return shall be made in all cases of estates subject to the tax or where the gross estate at the death of the decedent exceeds \$60,000, and in the case of the estate of every nonresident any part of whose gross estate is situated in the United States. If the executor is unable to make a complete return as to any part of the gross estate of the decedent, he shall include in his return a description of such part and the name of every person holding a legal or beneficial interest therein, and upon notice from the collector such person shall in like manner make a return as to such part of the gross estate. The Commissioner of Internal Revenue shall make all assessments of the

tax under the authority of existing administrative special and general provisions of law relating to the assessment and collection of taxes.

SEC. 206. That if no administration is granted upon the estate of a decedent, or if no return is filed as provided in section two hundred and five, or if a return contains a false or incorrect statement of a material fact, the collector or deputy collector shall make a return and the Commissioner of Internal Revenue shall assess the tax thereon.

SEC. 207. That the executor shall pay the tax to the collector or deputy collector. If for any reason the amount of the tax can not be determined, the payment of a sum of money sufficient, in the opinion of the collector, to discharge the tax shall be deemed payment in full of the tax, except as in this section otherwise provided. If the amount so paid exceeds the amount of the tax as finally determined, the Commissioner of Internal Revenue shall refund such excess to the executor. If the amount of the tax as finally determined exceeds the amount so paid the commissioner shall notify the executor of the amount of such excess. From the time of such notification to the time of the final payment of such excess part of the tax, interest shall be added thereto at the rate of ten per centum per annum, and the amount of such excess shall be a lien upon the entire gross estate, except such part thereof as may have been sold to a bona fide purchaser for a fair consideration in money or money's worth.

The collector shall grant to the person paying the tax duplicate receipts, either of which shall be sufficient evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts.

SEC. 208. That if the tax herein imposed is not paid within sixty days after it is due, the collector shall, unless there is reasonable cause for further delay, commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

SEC. 209. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

If the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth), and if the tax in respect thereto is not paid when due, the transferee or trustee shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

SEC. 210. That whoever knowingly makes any false statement in any notice or return required to be filed by this title shall be liable to a penalty of not exceeding \$5,000 or imprisonment not exceeding one year, or both, in the discretion of the court.

Whoever fails to comply with any duty imposed upon him by section two hundred and five, or, having in his possession or control any record, file, or paper containing or supposed to contain any information concerning the estate of the decedent, fails to exhibit the same upon request to the Commissioner of Internal Revenue or any collector or law officer of the United States, or his duly authorized deputy or agent, who desires to examine the same in the performance of his duties under this title, shall be liable to a penalty of not exceeding \$500, to be recovered, with costs of suit, in a civil action in the name of the United States.

SEC. 211. That all administrative, special, and general provisions of law, including the laws in relation to the assessment and collection of taxes, not heretofore specifically repealed are hereby made to apply to this title so far as applicable and not inconsistent with its provisions.

SEC. 212. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make such regulations, and prescribe and require the use of such books and forms, as he may deem necessary to carry out the provisions of this title.

APPENDIX II.

TREASURY DEPARTMENT, UNITED STATES INTERNAL-
REVENUE REGULATIONS 37—LAWS AND REGULA-
TIONS RELATING TO ESTATE TAX, REVISED MAY,
1917.

ARTICLE XI. Property passing under a general
power of appointment is to be included as a portion
of the gross estate of a decedent appointer. (T. D.
2477.)

APPENDIX III.

An Act To provide revenue, and for other purposes (approved February 24, 1919).

[40 Statutes at Large, Part I, Sec. III, chap. 18, p. 1057 at pp. 1096 et seq.]

TITLE IV.—ESTATE TAX.

SEC. 400. That when used in this title—

The term “executor” means the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent; and

The term “collector” means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more than one district, then the collector of internal revenue of such district as may be designated by the commissioner.

SEC. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent

dying after the passage of this act, whether a resident or nonresident of the United States:

1 per centum of the amount of the net estate not in excess of \$50,000;

2 per centum of the amount by which the net estate exceeds \$50,000 and does not exceed \$150,000;

3 per centum of the amount by which the net estate exceeds \$150,000 and does not exceed \$250,000;

4 per centum of the amount by which the net estate exceeds \$250,000 and does not exceed \$450,000;

6 per centum of the amount by which the net estate exceeds \$450,000 and does not exceed \$750,000;

8 per centum of the amount by which the net estate exceeds \$750,000 and does not exceed \$1,000,000;

10 per centum of the amount by which the net estate exceeds \$1,000,000 and does not exceed \$1,500,000;

12 per centum of the amount by which the net estate exceeds \$1,500,000 and does not exceed \$2,000,000;

14 per centum of the amount by which the net estate exceeds \$2,000,000 and does not exceed \$3,000,000;

16 per centum of the amount by which the net estate exceeds \$3,000,000 and does not exceed \$4,000,000;

18 per centum of the amount by which the net estate exceeds \$4,000,000 and does not exceed \$5,000,000;

20 per centum of the amount by which the net estate exceeds \$5,000,000 and does not exceed \$8,000,000;

22 per centum of the amount by which the net estate exceeds \$8,000,000 and does not exceed \$10,000,000; and

25 per centum of the amount by which the net estate exceeds \$10,000,000.

The taxes imposed by this title or by Title II of the Revenue Act of 1916 (as amended by the act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the extensions of fortifications, and for other purposes," approved March 3, 1917) or by Title IX of the Revenue Act of 1917, shall not apply to the transfer of the net estate of any decedent who has died or may die while serving in the military or naval forces of the United States in the present war or from injuries received or disease contracted while in such service, and any such tax collected upon such transfer shall be refunded to the executor.

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created

before or after the passage of this act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent;

(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over \$40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

SEC. 403. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes;

(2) An amount equal to the value at the time of the decedent's death of any property, real, personal, or mixed, which can be identified as having been received by the decedent as a share in the estate of any person who died within five years prior to the death of the decedent, or which can be identified as having been acquired by the decedent in exchange for property so received, if an estate tax under the revenue act of 1917 or under this act was collected from such estate, and if such property is included in the decedent's gross estate;

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net

earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; and

(4) An exemption of \$50,000;

(b) In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States—

(1) That proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated, but in no case shall the amount so deducted exceed 10 per centum of the value of that part of his gross estate which at the time of his death is situated in the United States;

(2) An amount equal to the value at the time of the decedent's death of any property, real, personal, or mixed, which can be identified as having been received by the decedent as a share in the estate of any person who died within five years prior to the death of the decedent, or which can be identified as having been acquired by the decedent in exchange for property so received, if an estate tax under the Revenue Act of 1917 or under this Act was collected from such estate, and if such property is included in that part of the decedent's gross estate which at the time of his death is situated in the United States; and

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any domestic corporation

organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes within the United States. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; and

No deduction shall be allowed in the case of a nonresident unless the executor includes in the return required to be filed under section 404 the value at the time of his death of that part of the gross estate of the nonresident not situated in the United States.

For the purpose of this title stock in a domestic corporation owned and held by a nonresident decedent, and the amount receivable as insurance upon the life of a nonresident decedent where the insurer is a domestic corporation, shall be deemed properly within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (c) of section 402, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

In the case of any estate in respect to which the tax under existing law has been paid, if necessary to allow the benefit of the deduction under paragraph (3) of subdivision (a) or (b) the tax shall be redetermined and any excess of tax paid shall be refunded to the executor.

SEC. 404. That the executor, within sixty days after qualifying as such, or after coming into possession of any property of the decedent, whichever event first occurs, shall give written notice thereof to the collector. The executor shall also, at such times and in such manner as may be required by regulations made pursuant to law, file with the collector a return under oath in duplicate, setting forth (a) the value of the gross estate of the decedent at the time of his death, or, in case of a nonresident, of that part of his gross estate situated in the United States; (b) the deductions allowed under section 403; (c) the value of the net estate of the decedent as defined in section 403; and (d) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

Return shall be made in all cases where the gross estate at the death of the decedent exceeds \$50,000, and in the case of the estate of every nonresident any part of whose gross estate is situated in the United States. If the executor is unable to make a complete return as to any part of the gross estate of the decedent, he shall include in his return a description of such part and the name of every person holding a legal or beneficial interest therein, and upon notice from the collector such person shall in like manner make a return as to such part of the gross estate. The Commissioner shall make all assessments of the tax under the authority of existing administrative special and general provisions of law relating to the assessment and collection of taxes.

SEC. 405. That if no administration is granted upon the estate of a decedent, or if no return is filed as provided in section 404, or if a return contains a false

or incorrect statement of a material fact, the collector or deputy collector shall make a return and the Commissioner shall assess the tax thereon.

SEC. 406. That the tax shall be due one year after the decedent's death; but in any case where the Commissioner finds that payment of the tax within one year after the decedent's death would impose undue hardship upon the estate, he may grant an extension of time for the payment of the tax for a period not to exceed three years from the due date. If the tax is not paid within one year and 180 days after the decedent's death, interest at the rate of 6 per centum per annum from the expiration of one year after the decedent's death shall be added as part of the tax.

SEC. 407. That the executor shall pay the tax to the collector or deputy collector. If the amount of the tax can not be determined, the payment of a sum of money sufficient, in the opinion of the collector, to discharge the tax shall be deemed payment in full of the tax, except as in this section otherwise provided. If the amount so paid exceeds the amount of the tax as finally determined, the Commissioner shall refund such excess to the executor. If the amount of the tax as finally determined exceeds the amount so paid, the collector shall notify the executor of the amount of such excess and demand payment thereof. If such excess part of the tax is not paid within thirty days after such notification, interest shall be added thereto at the rate of 10 per centum per annum from the expiration of such thirty days' period until paid, and the amount of such excess shall be a lien upon the entire gross estate, except such part thereof as may have been sold to a bona fide purchaser for a fair consideration in money or money's worth.

The collector shall grant to the person paying the tax duplicate receipts, either of which shall be sufficient evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts.

SEC. 408. That if the tax herein imposed is not paid within 180 days after it is due, the collector shall, unless there is reasonable cause for further delay, proceed to collect the tax under the provisions of general law, or commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto.

If the tax or any part thereof is paid by, or collected out of *ci* that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of \$40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

SEC. 409. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate releasing any or all property of such estate from the lien herein imposed.

If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to

a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

SEC. 410. That whoever knowingly makes any false statement in any notice or return required to be filed under this title shall be liable to a penalty of not exceeding \$5,000, or imprisonment not exceeding one year, or both.

Whoever fails to comply with any duty imposed upon him by section 404, or, having in his possession or control any record, file, or paper, containing or supposed to contain any information concerning the estate of the decedent, or, having in his possession or control any property comprised in the gross estate of the decedent, fails to exhibit the same upon request to the Commissioner or any collector or law officer of the United States, or his duly authorized deputy or agent, who desires to examine the same in the performance of his duties under this title, shall be liable to a penalty of not exceeding \$500, to be recovered, with costs of suit, in a civil action in the name of the United States.



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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 442

UNITED STATES,

Appellant,

vs.

STANLEY FIELD, AS EXECUTOR OF THE ESTATE OF KATE
FIELD, DECEASED,

Appellee.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

JOHN P. WILSON,
WILLIAM B. HALE,
WALTER BRUCE HOWE,
Attorneys for Appellee.



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APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

The question presented for decision by the appeal in this case is whether income from property owned by Joseph N. Field at the time of his death, and now held in trust under his will, is subject to an estate tax as the property of Kate Field by reason of her exercising by her will a power of appointment over said income under the will of her husband, Joseph N. Field.

Kate Field had a life interest in the income of the fund in question in addition to the power of appointment over such income after her death, to be exercised by her will.

Kate Field's life interest in the income necessarily ceased at her death. Whatever property she accumulated from such income during her life, was of course taxable as a part of her estate, but her taxable estate was

not otherwise increased or affected by reason of her life interest in the income of the trust fund.

The question at issue is precisely the same as though she had possessed and exercised her power of appointment without having any other interest in the trust fund.

The question is whether under the Internal Revenue Act of September 8, 1916, property is taxable as a part of the estate of the donee of a general power of appointment by will solely by reason of the exercise of such power of appointment.

The language of the act under which it is claimed the property in question is taxable is as follows:

"SECTION 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the *net estate of every decedent* dying after the passage of this act. . . .

SECTION 202. That the value of the *gross estate of the decedent* shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated;

(a) To the extent of the *interest therein of the decedent at the time of his death* which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth."

"SECTION 203. That for the purpose of the tax the value of the net estate shall be determined:

(a) In the case of a resident, by deducting from

the value of the gross estate (here follows list of deductions) * * *."

If a tax is levied on the property in question, it must be by Section 201, which only levies a tax upon the "*net estate of the decedent*." Sections 202 and 203 do not levy any tax, but specify how the "net estate of the decedent" subject to the tax shall be ascertained and determined.

Section 202 specifies how the value of "the gross estate of the decedent" shall be ascertained and Section 203 specifies what deductions are to be made from the "gross estate" of the decedent in order to arrive at the net estate of the decedent, which is made subject to the tax.

It is claimed by the Government that the property in question is taxable under each of the above clauses (a) and (b) of Section 202.

The question is whether either of these clauses includes an interest in property which was never owned by the decedent.

No express reference is made in this statute to property over which the decedent had only a power of appointment.

The specified object of Section 202 is to define the method of determining "the value of the gross estate of the decedent," which after certain deductions is to constitute the net estate of the decedent upon which the tax is levied.

The subject matter of each of the clauses (a) and (b), Section 203, is the estate of the decedent, *i. e.*, property which was owned by the decedent while living.

Under Clause (a) all property is included in determining the value "of the gross estate of the decedent"

"to the extent of the interest therein of the decedent at the time of his death, which after his death is (1) subject to the payment of the charges against his estate and (2) the expenses of its administration and (3) is subject to distribution as part of his estate."

The interest in property taxable under this clause is limited to the interest therein owned by the decedent while living, and it must be subject to distribution as part of his estate.

Kate Field never owned any interest in the property upon which the tax in question was levied, i. e., the income accruing from the trust fund after her death, and said income was not distributable as a part of her estate.

Clause (b) of Section 202 clearly relates to transfers made by a decedent while living and not by will, and is limited to property owned by the decedent. The contention of the Government in regard to this clause, if sustained, would make taxable property passing under a special power of appointment. If the will of J. N. Field had limited the power of Kate Field to appoint the income in question to the children of J. N. Field in such shares as she might designate in her last will, it would still be taxable under the contention here made on behalf of the Government.

Even the amended act passed in 1919 does not undertake to tax property appointed by a decedent under a limited power of appointment. Property passing under a limited power is in no sense the property of the donee of the power and is not subject, even in equity, to be taken for the donee's debts.

The statute in question only undertakes to levy a tax on the "net estate of the decedent." Certainly a construction should not be given to Clause (b) which would

subject property, which was in no sense property of the decedent, to the estate tax.

The Revenue Act of 1916 does not in express terms levy a tax upon appointed property, and the extension of the tax by construction to appointed property results in the tax being collectible in some states and not in others.

In Pennsylvania appointed property is not subject to the payment of the debts of the donee of the power, and the courts have held that such property is therefore not subject to the estate tax under the Act of 1916 upon the death of the donee of the power.

This decision has been accepted by the Treasury Department of the United States, and under the regulations now in force no estate tax is attempted to be collected upon appointed property in the State of Pennsylvania. This principle will exempt from estate tax appointed property in all other states in which such property is not subject to the payment of the debts of the donee of the power.

Excise taxes are required by the Constitution to be uniform within the United States. The uniformity required is geographical. The tax in question is an excise tax, and cannot be sustained under a construction of the statute which levies it upon appointed property in some states and not in others.

ARGUMENT.

I.

UNLESS THE TAX COLLECTED IN THIS CASE IS IMPOSED BY CLEAR AND EXPRESS WORDS IN THE STATUTE IT CANNOT BE SUSTAINED.

In the case of *Gould v. Gould*, 245 U. S. 151, this court said:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen. (*United States v. Wigglesworth*, 2 Story, 369; *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 474; *Benziger v. United States*, 192 U. S. 38, 55.)"

In *Treat v. White*, 181 U. S. 264, the court said:

"It is also true, as said by this court in *United States v. Isham*, 17 Wall. 496, 504, 'If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because in the language of Pollock, C. B., in *Girv v. Scudds*, 11 Exchequer, 191, 'a tax cannot be imposed without clear and express words for that purpose.'" With that proposition we fully agree. *There must be certainty as to the meaning and scope of language imposing any tax, and doubt in respect to its meaning is to be resolved in favor of the taxpayer.*" (p. 267.) (Italics ours.)

In *Eidman v. Martinez*, 184 U. S. 578, the court said:

"It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be

given to words of *exception* confining the operation of duty.

We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally interpreted in favor of the importer, and that the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language. *Hartranft v. Wiegmann*, 121 U. S. 609; *American Net & Twine Co. v. Worthington*, 141 U. S. 468; *United States v. Wigglesworth*, 2 Story, 369; *Powers v. Barney*, 5 Blatchford, 202." (p. 583.)

In *Hartranft v. Wiegmann*, 121 U. S. 609, the court had before it the question of the duty levied upon shells under a statute passed by Congress, and the court said:

"We are of opinion that the decision of the Circuit Court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, 'as duties are never imposed on the citizen upon vague or doubtful interpretations.'" (p. 616.)

In *Thompson v. United States*, 246 U. S. 547-551, the court said:

"The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture. (*Gardner v. Collins*, 2 Pet. 58, 93; *United States v. Goldenberg*, 168 U. S. 95, 102.)

In the case of *Caminetti v. United States*, 242 U. S. 470, 490, the court said:

"It has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not lead-

ing to absurd or wholly impracticable consequences, *it is the sole evidence of the ultimate legislative intent.* See *Mackenzie v. Hare*, 239 U. S. 299, 308." (Italics ours.)

The Revenue Act of 1916 does not contain clear or express words levying a tax upon property never owned by the decedent, and over which the decedent had only a power of appointment by will. The Government does not contend that in said act there are clear and express words levying a tax upon property not owned by the decedent. If the act had contained clear and express words levying the tax, it is inconceivable that counsel for the Government should have undertaken in their brief to show that it was the intention of Congress to levy a tax upon such property by referring to the subsequent Revenue Act passed by Congress in 1919, and to a report of a committee of Congress made in 1918, long subsequent to the accruing of the tax in question if it should be found to be legal. (See pp. 7 and 8, Government Brief.)

The insertion of clause (e) in the Revenue Act of February 24, 1919, expressly taxing estates passing under a general power of appointment exercised by the decedent was a legislative declaration that such appointed estates were not embraced within the provisions of the Revenue Act of 1916. This was expressly held by the Court of Appeals of New York *In re Harbeck's Will*, 161 N. Y. 211, in which case the court said:

"The decision of this court *In re Miller's Estate*, 110 N. Y. 216, 18 N. E. 139, is authority for the proposition that the Act of 1897 is entitled to consideration at the hands of the court, *as a legislative declaration that the subject matter of the new provisions did not prior thereto constitute a part of the law.* In that case the question was whether a legacy to an adopted child was taxable, the tax having been imposed in 1886 under the law as it then stood. But, the legislature having a year later passed an act ex-

pressly exempting adopted children, this court, in determining whether the legacy was taxable under the law as it stood in 1886, said: 'Moreover, the fact that such provision was made by the Statute of 1887 (Chapter 713), and the Act of 1885 amended accordingly, must be regarded as a legislative declaration that the law did not, as originally passed, embrace the provisions which the later act supplies.' "

The Circuit Court of Appeals for the Eighth Circuit, in the case of *United States v. Bashaw*, 50 Fed. 749, said:

"The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act." (p. 754.)

If the act had contained express words levying the tax it would have been unnecessary for the Government to rely upon the cotemporaneous construction of the law by the Executive Department. (Brief, p. 7.)

The construction of the Executive Department relied on were the regulations issued by the Secretary of the Treasury in May, 1917, and in pursuance of which regulation the tax in this particular case is sought to be collected. This regulation became obsolete by the repeal of Section 202 by the Act of February 24, 1919. The regulation was in force less than two years, and was never acquiesced in. In support of the weight of executive construction the Government cites *United States v. Pugh*, 99 U. S. 265 (Brief, p. 7), in which case the construction of the statute contended for had been acted upon both by the executive and the court of claims for many years. The court said:

"It is a familiar rule of interpretation that in the case of a *doubtful and ambiguous law* the contemporaneous construction of those who have been

called upon to carry it into effect is entitled to great respect. *Edward's Lessee v. Darby*, 12 Wheat. 210. While, therefore, the question is one by no means free from doubt, we are not inclined to interfere, at this late day, with a rule which has been acted upon by the Court of Claims and the executive for so long a time." (p. 269.) (Italics ours.)

The other case cited, *United States v. Johnson*, 124 U. S. 236, is to the same effect.

It is to be noted that the principle relied upon is only applicable in the case "*of a doubtful and ambiguous law.*" But it is well settled that if a statute levying a tax is doubtful and ambiguous, the doubt must be resolved against the Government.

If the statute in this case is not doubtful and ambiguous, it is immaterial what construction was placed upon it by the executive. If it is doubtful and ambiguous, then the tax cannot be sustained.

The decisions of the Treasury Department construing a revenue act were set up by the government in *United States v. Standard Brewery*, 251 U. S. 210, in regard to which the court said:

"While entitled to respect, as such decisions are, they cannot enlarge the meaning of a statute enacted by Congress."

II.

THE REVENUE ACT OF 1916, AS CONSTRUED BY THE GOVERNMENT, DOES NOT TAX APPOINTED PROPERTY IN ALL OF THE STATES, AND THEREFORE CANNOT BE HELD TO TAX SUCH PROPERTY IN ANY OF THE STATES, AS EXCISE TAXES ARE REQUIRED BY SECTION 8 OF ARTICLE I OF THE CONSTITUTION TO BE UNIFORM THROUGHOUT THE UNITED STATES.

In the case of *Lederer v. Pearce*, 266 Fed. Rep. 497, the Circuit Court of Appeals for the Third Circuit held that in Pennsylvania property passing under a general power of appointment by will passes as the property of the donor of the power, and not as the property of the donee of the power, and was not subject to the estate tax levied by the Revenue Act of 1916, upon the death of the donee of the power.

Under this decision the property appointed by Mrs. Field would not have been taxable if she had been a resident of Pennsylvania and the property in question had been located there, but a statute which makes appointed property taxable if located in Illinois but not taxable if located in Pennsylvania, violates the uniformity required by the Constitution of the United States.

The correctness of the decision in the case of *Lederer v. Pearce*, *supra*, holding appointed property not subject to estate taxes in Pennsylvania, is not questioned by the Government, but has been accepted as correct, and the regulations for the administration of the Internal Revenue Act and the collection of the estate tax has been modified accordingly.

The treasury decisions and regulations now in force are as follows:

"Property passing under general power of ap-

pointment under the laws of Pennsylvania. Revenue Act of 1916.

Property passing under general power of appointment, where the construction and effect of the power, and the rights of the parties thereunder, are governed by the laws of Pennsylvania, should not be included in the gross estate of the decedent exercising the power in a case arising under Title II of the Revenue Act of 1916.

This T. D. which merely incorporates a decision of the United States Circuit Court of Appeals for the Third Circuit, in the case of *Lederer, Collector, v. Pearce, Executor*, 266 Fed. 497, is published for the information of internal revenue officers and others concerned.

This decision is accepted by the Treasury Department as to all cases, arising under Title II of the Revenue Act of 1916, in which the construction and effect of the power of appointment, and the rights of the parties thereunder, are governed by the laws of Pennsylvania. In such cases the appointed property will not be included in the gross estate of the decedent exercising the power. It has no application to cases arising under Title IV of the Revenue Act of 1918. Treasury Decision 2477 (April 7, 1917) is modified accordingly. (T. D. 3088, dated October 30, 1920.)

T. D. 2477, modified by T. D. 3088, above quoted, is as follows:

“(T. D. 2477.)

PROPERTY PASSING UNDER GENERAL POWER OF APPOINTMENT IS TAXABLE AS A PORTION OF THE GROSS ESTATE OF THE DECEDENT APPOINTOR.

TREASURY DEPARTMENT,

Office of Commissioner of Internal Revenue,
WASHINGTON, D. C., April 7, 1917.

To Collectors of Internal Revenue:

It is held that where a decedent exercises a general power of appointment as donee under the will

of a prior decedent the property so passing is a portion of the gross estate of the decedent appointor."

War Tax Service 1918, page 58.

The Treasury regulation providing for the collection of an estate tax upon appointed property is based upon T. D. 2477, and is as follows:

"ART. XI. Property passing under a general power of appointment is to be included as a portion of the gross estate of a decedent appointor. (T. D. 2477 (Sec. 195).)"

War Tax Service 1918, p. 26.

The tax collected in this case was levied and collected under T. D. 2477 above quoted. This regulation as modified by T. D. 3088 undertakes to collect a tax in Illinois which could not be collected upon the same subject matter in the State of Pennsylvania, and in other states of the union having laws and decisions similar to those in Pennsylvania.

The uniformity in excise taxes required by the Constitution of the United States is geographical. This uniformity was defined by this court in *Knowlton v. Moore*, 178 U. S. 41, as follows:

"The tax is uniform when it operates with the same force and effect in every place where the subject of it is found." (p. 86.)

The subject matter under consideration is appointed property not owned by the decedent. Such property, when found in Pennsylvania, is not subject to an estate tax. It therefore cannot be subject to an estate tax elsewhere in the United States, as otherwise the uniformity in taxes required by the Constitution would not exist.

The statute of 1916 does not in terms make appointed property not owned by the decedent subject to the tax. It in terms only undertakes to levy a tax upon "*the net*

estate of the decedent," i. e., it confines the tax to property owned by the decedent during his lifetime. The Government is attempting, through its executive department, to construe and enforce this statute so as to collect estate taxes upon appointed property in some of the states and not in others. This is an attempt to accomplish by construction an end that could not have been accomplished if attempted by express words in the statute itself. If the statute had specifically provided that property passing under a general power of appointment, exercised by the decedent, should be taxable in all states where such appointed property was subject to the payment of the debts of a decedent, and was distributable as a part of his estate, but should not be taxable in those states in which such appointed property was not subject to the payment of the debts of the decedent, or was not distributable as a part of his estate, it is beyond question that such provision of the statute would have been void because it would levy a tax not uniform throughout the United States. A tax based on regulations and a construction emanating from the Treasury Department, can have no more validity than it would have if levied by the express words of the statute.

The amendment to the Revenue Act passed in February, 1919, specifically provides for levying the estate tax upon property passing under a general power of appointment, wholly independent of the laws or decisions of the different states, thus making the tax thereby imposed uniform and free from this constitutional objection. (Clause (c), page 36, Gov. Brief.)

III.

THE REVENUE ACT OF 1916 DOES NOT CONTAIN CLEAR AND EXPRESS WORDS IMPOSING AN ESTATE TAX UPON AN INTEREST IN PROPERTY NEVER OWNED BY APPELLEE, BUT OVER WHICH SHE HAD ONLY A POWER OF APPOINTMENT.

The interest in the trust estate taxed in this case was the income accruing after the death of appellee. Her beneficial interest in the trust estate was limited to income accruing during her life. Over the income accruing after her death she possessed only a power of appointment by will.

First. The tax in question cannot be sustained under clause (a) of Section 202.

The property included as a part "of the gross estate of the decedent" under clause (a) is limited in terms

"to the extent of the interest therein of the decedent at the time of his death, which is, after his death,
* * * subject to distribution as part of his estate."

The property taxed in this case does not fall within either of the two specific requirements of the statute above quoted.

(1) The interest of the decedent at her death or at any time during her life, did not include the subject matter upon which the tax in question is levied.

The subject matter upon the value of which the tax is levied is the income of the trust fund *accruing after the death of the decedent*. Over this income the only interest of the decedent was a power of appointment to be exercised by her will. This power of appointment did not vest in the donee of the power while she was living ownership of any interest in the appointed property.

The interest which the donee of a power of appointment has in the appointed estate is discussed at some length in the Government Brief. In this discussion it is suggested that the interest of the donee in the appointed property is such that it may be subject to the lien of judgments against the donee, and in that connection reference is made to the Illinois statutes and to the case of *McFall v. Fitzpatrick*, 236 Ill. 281 (Arg. p. 16), in which case the court said:

"The complainant by the decree was declared invested also with all the right, title and interest, both at law and in equity, which the said Eliza J. Houston took in the said premises by virtue of said trust deed. That interest was the right to receive the net income during her life. *The power of appointment was no interest in the property.* Even if she might have executed the power of appointment in favor of herself she could not be treated as the owner. *No title or interest in the thing vests in the donee of the power until he exercises the power.* (*Gilman v. Bell*, 99 Ill. 144.) *A power does not, of itself, confer any interest in the subject matter upon the donee.* (22 Am. & Eng. Ency. of Law,—2d ed.—1905; *Carver v. Jackson*, 4 Pet. 92.) The subject of a power is the property of the donor,—not of the donee of the power,—and when the power is executed the person taking under it takes under him who created the power and not under him who executes it. (*Bingham's Appeal*, 64 Pa. 345; *Leggett v. Doremus*, *supra*.) If the power is executed the property passes under the original deed or will, through the execution of the power, to the person designated, and if not executed it remains to be affected by the other provisions of the instrument or is not disposed of. (*Collins v. Wickwire*, 162 Mass. 143; *Keays v. Blinn*, *supra*.) Upon the death of Mrs. Houston nothing remained for the trustee to do but convey to her appointee, and the trust having therefore become passive was executed by the statute of uses and the appellee became at once invested with the legal title." (Italics ours.) (pp. 314-315.)

In the case of *Keays v. Blinn*, 234 Ill. 121, the court held that one possessing a life estate, and having the power to appoint the fee, which he exercised, was not during his life the owner of the fee; nor were the rights of parties claiming under him the same as though he had been the owner of the fee.

In *Walker v. Mansfield*, 221 Mass. 600, the question involved was whether personal property held by a trustee in Baltimore, passing by appointment under the will of a resident of Massachusetts, was subject to a succession tax in Massachusetts.

The Massachusetts statute in specific terms made property passing under a power of appointment subject to a succession tax. The donor of the power was a resident of Maryland. The question was whether the State of Massachusetts had jurisdiction to impose the tax. The court said:

"If the property in Maryland had belonged to Mrs. Barnard, it would have been subject to the tax. *Frothingham v. Shaw*, 175 Mass. 59, 55 N. E. 623, 78 Am. St. Rep. 475. But it did not belong to her. She had no title to it. She simply had the power of disposition if she chose to exercise it. This power does not constitute it her property. *Emmons v. Shaw*, 171 Mass. 410, 50 N. E. 1033. The power is a deputation of the donee to act for the donor in disposing of the donor's property. Personal property, over which one has the power of appointment, is not the property of the donee, but of the donor of the power. The property in the case at bar was not that of Mrs. Barnard, but of her first husband, who established the trust and created the power. Her own estate is ample to pay all debts, so there is no room for the application of *Clapp v. Ingraham*, 126 Mass. 200. If she has exercised the power, the instrument whereby that has been brought about takes effect not as a disposition of her own property but as an appointment of property of her first husband under the power conferred by his will.

The appointees will take not as legatees of Mrs. Barnard but as grantees or donees of Mr. Boyd or the trustees who are his representatives. Heath v. Withington, 6 Cush. 497; Sewell v. Wilmer, 132 Mass. 131, 136. If she has failed to exercise the power conferred upon her, the devolution of the trust fund to her heirs takes place by virtue of the will of Mr. Boyd, which will be given efficacy by the law of Maryland, the state of his domicile. In either event, the situs of the property does not attach to the domicile of the donee of the power." (Italics ours.)

In *Shattuck v. Burrage*, 229 Mass. 448, the court said:

"When a donor gives to another power of appointment over property, the donee of the power does not thereby become the owner of the property. The donee has no title whatever to the property. The power is simply a delegation to the donee of authority to act for the donor in the disposition of the latter's property. The appointee named by exercise of this delegated authority takes as recipient of the bounty of the donor and not as legatee of the donee. *Walker v. Treas. & Recvr. Genl.* 221 Mass. 600, 109 N. E. 647, where authorities are collected. *Drake v. Atty. Genl.* 10 Cl. & F. 257, 286. The right to exercise the power is not property and cannot be reached by creditors. *Crawford v. Laegmaid*, 171 Mass. 309, 311, 50 N. E. 606. On no theory of hard fact is the property appointed the property of the donee of the power."

No authority is cited which sustains the proposition that the donee of a power of appointment by will, is, during life, the owner of the appointed property, or of any interest therein. The statute levied a tax only on the interest in property which the decedent had during life. The tax cannot be sustained unless the decedent owned the interest in the property which is taxed in this case. The tax is levied upon the entire value of the appointed property. The value is based upon the absolute ownership of the appointed property, i. e., the income of the trust property after the death of Mrs. Field. The tax

is the same as it would have been if she had owned in her own right the income of the trust fund accruing after her death. Her interest during life as donee of the power did not constitute ownership of the appointed property, or of any part thereof, or of any interest therein.

(2) The interest which the decedent had in the appointed property while living was not "subject to distribution as part of his" (her) "estate."

The only interest which the decedent had while living was a power of appointment to be exercised by her will. In the very nature of the case this interest, unless it constituted an ownership of the appointed property, could not be distributed as a part of her estate. It is not even contended that the possession of such power of appointment constituted an ownership of the property to which it applied.

(3) The interest in the appointed property upon which the tax is levied, is not distributable as a part of the decedent's estate.

The tax is levied upon the value of the entire appointed estate. To sustain the tax, under Clause (a) it is necessary that the appointed estate must have been owned by the decedent in her lifetime, and that it must be subject to distribution as a part of her estate. The claim in the Government Brief that the appointed estate is subject to distribution as part of the decedent's estate, seems to be based upon the claim that it is subject to the payment of the debts of the decedent.

But Clause (a) requires both that the interest of the decedent should be subject to the payment of his debts, and also be subject to distribution as a part of his estate. The latter requirement is in addition to the requirement that the interest shall be subject to the payment of debts.

Appointed property is subject to the payment of the debts of the donee of the power in Illinois if at all only by a proceeding in equity by his creditors, upon the ground that the appointment to a volunteer is a fraud upon his creditors.

The doctrine so enforced is strictly analogous to a debtor making a conveyance, without consideration, of his property, leaving his debts unpaid. In such case the creditors can, by a proceeding in equity, subject the property so conveyed to the payment of their debts, but the debtor, or those claiming under him, can assert no interest in the property so conveyed, and such property is not distributable as a part of his estate. This is well settled law in Illinois.

In *Sifford v. Cutler*, 244 Ill. 234, the court said:

"Under our statute an administrator or executor can petition only to sell the real estate to which the decedent 'had claim or title' at the time of his decease. (*In re Estate of Stahl*, 227 Ill. 529.) It is a well settled principle of law that as between the parties to a fraudulent conveyance the deed is valid and binding and the grantor retains no legal or equitable interest in the property conveyed. It is only creditors who can question the fairness of the transaction. The right of an administrator to bring an action to set aside the conveyance of his intestate on the ground that it was fraudulent has never been recognized in this state. As to such a conveyance the administrator stands in the shoes of his intestate, and it cannot be contended that the deceased could have maintained such an action in his lifetime.

In *Beebe v. Saulter*, 87 Ill. 518, it was held that a purchaser at an administrator's sale of real estate to pay debts could not maintain a bill in chancery to set aside as fraudulent a deed made by the decedent in his lifetime, for the reason that, the decedent having had no title or claim of title at the time of his death, there was nothing for his administrator to sell.

In the case of *White v. Russell*, 79 Ill. 155, a bill in chancery was filed in the Circuit Court by one of the creditors of an insolvent estate, seeking to have a fraudulent conveyance of real estate set aside as to him. It was contended there that as the creditor's claim had been allowed against the estate, an application by the administrator was the only mode by which the decedent's interest in land could be reached. In commenting upon the general rule that proceedings for the sale of real estate to pay debts must be by the administrator, this court said, referring to such rule: 'But it has its limitations, as, where a debtor in his lifetime makes a fraudulent conveyance to hinder or delay his creditors, such a conveyance, although void as to creditors, is binding on his heirs and representatives. Neither his heirs, executors, nor his administrators can maintain a bill to set aside the conveyance, as it is binding on them. This being true, the only mode of reaching such property is by a bill filed by one or more of the creditors of the estate.' " (pp. 236-237.)

Under the statutes of Illinois the widow of a decedent is entitled to an award out of the estate of her husband, consisting of specified personal property at its appraised value, and such sum of money as the appraisers may deem reasonable for the proper support of herself and the minor children for one year in a manner suited to her condition in life; such allowance to be not less than \$500, with an addition of \$200 for each minor child, which award is entitled to priority in payment over all claims against the estate except funeral expenses and costs of administration. (Secs. 70-74, Chap. 3, Rev. Stat. of Illinois.)

The widow is also entitled to renounce any provision made for her by her husband's will, and to receive out of his estate, if there be children,—(a) dower in his lands, and (b) one-third ($1/3$) of the personal estate after the payment of all debts; or if there be no children one-half ($1/2$) of all the real and personal estate after the pay-

ment of debts. (Secs. 10 and 12, Chap. 41, Rev. Stat. of Illinois.)

If appointed property were subject to distribution as a part of the estate of the donee of the power, the widow of the donee would be entitled to receive a share of such property under the provisions of the statute above referred to. But no case has been cited, and it is believed that none exists, in which any court has held that the widow of the donee of a power exercised by will can claim an interest in the appointed property the same as though it had been owned by her husband, or that the appointment of the property to other parties constitutes even in equity a fraud upon the widow of the donee of the power.

In *Hallbeck v. Stewart*, 69 Ill. App. 225, the court said:

"The widow stands in her husband's place. She cannot lay claim to property which was not his. If the husband at his death was not the owner of the property his death does not confer title upon him. How then can the property be held by the widow as a part of her award, when her right to an award arises by reason of, and therefore after, her husband's death?" (pp. 227-228.)

In *Hill v. Treasurer and Receiver General*, 229 Mass. 474, in construing a statute which specifically provided for a succession tax upon appointed property, the court said:

"Equity seizes the property on its way from the donor to the appointee, and applies it to the satisfaction of the obligations of the appointor. The irresistible consequence of these principles is that the appointed property does not pass by the will of the donee of the power. Perhaps in spite of the express words of the will of the donee, and certainly in opposition to its plain implication, the appointed property is diverted to the payment of an equitable charge upon it. It is not transmitted according to the will. Its course is directed by the law, regardless of the provisions of the will. The exercise of

the power of appointment by will sets in motion another and different force quite outside itself, namely, the equitable doctrine, which in itself is the primary and sole direct cause of the transmission of the property to the creditors of the donee. The execution of the power is the remote condition, not the immediate antecedent of that result. The appropriation of so much of the appointed property as is necessary to pay the donee's debts is the consequence not of the will, but of the operation of principles of equity. If there were no appointment by will, the disposition of the property would be different. But that circumstance is not enough to support the contention that the property thus appointed passes by will, when in fact its disposition is or may be contrary to the will. It does not pass by will any more than does property owned by a testator, which does not go to his legatees because used in the payment of his debts. The disposition of the appointed property is regulated by the law, not by the law of wills nor by the law of intestate succession, nor by the law of deeds, grants, or gifts, but by the law as administered by a court of equity in the interest of the mandate of common honesty to the effect that one should be just before he is generous and pay his debts before he makes gifts."

In the recent case of *O'Grady v. Wilmot* (Law Reports, 2 Appeal Cases, 231), decided by the House of Lords in 1916, the question arose under the Finance Act of 1894, whether personal property appointed by will in exercise of a general power of appointment was property which passed to the executor within the meaning of said act. The court examined all previous English cases on the subject at length and summarized the result as follows:

"Property subject to a general power of appointment exercised by deed or will could be made available for payment of the testator's debts by proceedings instituted in chancery. It was considered contrary to good faith to permit a power to be exercised in favour of volunteers so as to defeat the creditors

of the donee of the power. The court therefore intercepted the fund—to use the language of Lord Hardwicke, ‘stopped it *in transitu*’—and either by regarding the appointee as trustee for the creditors, or by virtue of saying that in the circumstances the creditors had an equity against the fund, caused it to be applied for payment of the debts, *but the fund was not any part of the estate of the donee of the power, nor was it anywhere decided that it passed to the executor.*” (Italics ours.)

The Government cites *Olney v. Balch*, 154 Mass. 318, as supporting their contention that “On the donee’s death her executors were entitled to administer the appointed estate as part of her assets.” (Argument, p. 16.)

In the subsequent case of *Hill v. Treasurer and Receiver General*, 229 Mass. 474, the court, referring to *Olney v. Balch*, *supra*, said:

“The fact that the appointed fund is turned over to the executor of the appointor arises merely as a matter of convenience of administration, not of strict legal right.”

The case of *Walker v. Mansfield*, *supra*, above quoted from, is conclusive that an appointed estate is not distributed even in Massachusetts as a part of the estate of the donee of the power.

The case of *Galard v. Winans*, 111 Md. 434, involved the question as to whether appointed property could be administered by an executor as a part of the donee’s estate, and the court held that it could not. The court said:

“Under the provisions of Code, Art. 81, Sec. 117 *et seq.*, the collateral inheritance tax is imposed only upon property passing to collateral relations from persons who may die seized thereof or transferred, by will or by deed or other instrument intended to take effect in possession after the death of the grantor, bargainor, deviser, or donor. That description does not include the property involved in the

present controversy. Nor do we think that, under the testamentary system in force in this state, when the donee of a general power of appointment over personalty executes the power by will and appoints an executor, he is ordinarily the proper person to administer and discharge the fund. Such is certainly not the case when the instrument conferring the power conveys the fund to trustees and directs them to dispose of it to the person appointed by the donee of the power. The only cases cited by the appellees as direct authorities upon this branch of the case are English ones. We have examined them, and in every instance, with one exception, there were special circumstances affording reasons for approving the payment of the fund to the executor of the donee of the power."

Great reliance is placed by the Government upon the case of *Attorney General v. Upton*, 1 Ex. L. R. (1865-66), p. 224. (Argument, pp. 18-20.)

The question at issue in that case was whether parties claiming under a power of appointment took in succession to the donee of the power *within the meaning of the English statute levying a succession tax*.

A suit was brought by the Attorney General to collect a "succession duty" under the provisions of the English statute upon the following facts:

Admiral Fanshawe, by his will devised certain lands to the use of his wife for life, remainder to such uses as she should by *deed* or will appoint, and in default of appointment to uses for the benefit of the testator's nephews. The testator's wife survived him, and *by a deed, executed and delivered during her life*, exercised her power of appointment.

The English statute expressly provided for the collection of a tax upon property passing under a power of appointment, and provided that the donee of a power "*shall be deemed to be entitled at the time of his exer-*

cising such power to the property or interest thereby appointed."

The decision of the case was placed by each of the judges (four in number) rendering an opinion upon the terms of the English statute. Pollock, C. B., said:

"The question to be decided is, from whom do the appointees under the deed executed by Mrs. Fanshawe derive their interest *within the meaning of the act?* * * * if she chose to exercise the power, she then by the words of s. 4, made it her property, and is to be considered to have taken an interest equal to the interest which she appointed. * * * being brought within s. 4, that section operates to make the property property of the donee, and the succession a succession in which she is the predecessor."

Martin, B., said:

"the donee of the power exercising it shall be considered a predecessor of the interest which he appoints, or that, in other words, the statute creates in the donee of the power for the purposes of taxation an interest equal to the whole interest which is given by him to the person taking under the power."

Bramwell, B., said:

"But in s. 2 the words are not technical; that section provides that 'every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property * * * shall be deemed to have conferred, or to confer, on the person entitled by reasons of any such disposition * * * a succession.' * * *

But if I am wrong in this, the Crown is inevitably entitled under s. 4; for, though I appreciate the argument which was very clearly put by Mr. Hannen, that the object of the section was to determine when the donee of a power was, and when he was not, to be considered successor to the donor, and that the words must be interpreted with reference to this governing intention, yet when it is said that the

donee of a power 'shall be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed,' it follows that from that time he is made a new terminus of succession."

Piggott, B., said:

"I also think that upon the construction of ss. 2 and 4, read together, the Crown is entitled to a 10 per cent. duty. Probably if s. 2 stood alone it would be otherwise; but it is unnecessary to discuss this, for in my judgment s. 4 clearly gives to the donee of the power an interest in the estate appointed. On the exercise of the power the section creates an interest in the donee, and having once vested that estate in her without any qualification, it must be taken to be hers for all purposes of taxation, and to be transmitted from her to the defendants." (pp. 227-229-230.)

It will be noted that the only question before the court in the above case was the construction of the English statute specifically levying a tax upon the appointed estate. The questions at issue in this case were not involved or discussed, in the case of *Chanler v. Kelsey*, 205 U. S. 466, cited by the Government (Argument, p. 19).

In that case Mr. Justice Day said that in *Attorney General v. Upton*, Baron Bramwell "seems to have gone farther, * * * than his brethren were willing to."

The language of Baron Bramwell quoted in the Government brief has been referred to but not approved in later cases both in England and in this country. In the case of *Emmons v. Shaw*, 171 Mass. 410, the court said:

"It is true that in *Attorney General v. Upton*, *supra*, Bramwell, B., speaking of section 2 of the succession duty act (16 & 17 vict. c. 51), says that the words are to be interpreted in their ordinary sense, and that, so interpreted, the donee of the power would be the person from whom the property was derived. But in *Attorney General v. Mitchell*, *supra* (6 Q. B. Div. 548), Lindely, J., referring to this

construction which he calls 'the popular construction,' says that it *never has been applied*, but that the conveyancer's construction, as he terms it, 'by which the appointment under a power, is incorporated into the instrument creating the power,' is the one which has been adopted. And the same principle has been applied in this country, so far as appears from the cases to which our attention has been called. *Com. v. Williams*, 13 Pa. St. 29; *Same v. Duffield*, 12 Pa. St. 277; *In re Stewart*, 131 N. Y. 274, 30 N. E. 184."

In order to sustain the tax in question under Clause (a) it is necessary that the court should hold,—

- (1) That the entire income of the trust fund held under the will of J. N. Field, accruing after the death of Kate Field and covered by her power of appointment, was owned by her during her life; and
- (2) That all of such income accruing after the death of Kate Field was subject to distribution as a part of her estate under the laws of Illinois.

No serious contention is made in the brief filed by the Government that the income of the trust estate accruing after Kate Field's death was owned by her while living. No authority is cited which would support that proposition. Kate Field and her husband, Joseph N. Field, were residents of Illinois, and the property involved was situated in the State of Illinois, and the question whether or not the power of appointment made Kate Field the owner of the property, over which she had the power of appointment, must be determined by the laws of the State of Illinois. Upon that question the decision of the Supreme Court of Illinois, in *McFall v. Fitzpatrick*, *supra*, is decisive. In that case the donee of the power had a life interest in property in Illinois, with a general power of appointment by her will over the remainder. The question was, what interest or ownership did the donee of the power have in the property situated in Illinois? The court said:

"That interest was the right to receive the net income during her life. *The power of appointment was no interest in the property.* * * * *A power does not of itself confer any interest in the subject matter upon the donee.*" (page 315.)

The question as to whether the appointed property was subject to distribution as a part of the estate of Mrs. Field is also a question to be determined by the laws of Illinois. The argument to support the affirmative of that proposition is based upon the claim that the appointed estate would be subject to the payment of the debts of Mrs. Field, but in Illinois this right can only be asserted by the creditors in a proceeding in equity. The rights of the creditors cannot be asserted through the Probate Court, in which the assets of the estate are distributed under Illinois law.

This is clearly established by *Sifford v. Cutler, supra*, and the Illinois cases therein cited. The law so established in Illinois is in accord with the principles of law established generally elsewhere by the decisions of the courts, as shown by the cases cited *supra*.

Clause (a) does not in clear and express terms include for taxation any interest in any property not owned by the decedent, but on the contrary in express terms limits the taxable property under Clause (a) to interests in property which the decedent had while living.

Second. The tax in question cannot be sustained under Clause (b), Section 202 of the Act of 1916.

The Treasury Department by its decision 3088, quoted above under Point II, has abandoned any effort to sustain the estate tax under this clause of the statute. No attempt was made to sustain the tax under this clause in the case of *Lederer v. Pearce, supra*, and the decision in that case, adverse to a collection of the tax in the State

of Pennsylvania, has been accepted and acted upon as the true and sound construction of the statute. If the tax could be sustained under Clause (b) it could be levied as well upon appointed property in Pennsylvania as elsewhere. All regulations issued by the Internal Revenue Commissioner have construed Clause (b) as relating to transfers or trusts made or created by the decedent *during his lifetime*, and not as relating to wills.

If Clause (b) in the Act of 1916 imposed a tax upon appointed estates by clear and express words, the same provision copied into the law of 1919 as Clause (c), imposed a like tax upon all appointed estates. But Clause (e) of the Act of 1919 specifically provides for the levy of a tax upon property passing under a *general* power of appointment. (Gov. Brief, p. 36.)

Both Clauses (a) and (b) of the Act of 1916 are carried forward into the Act of 1919 as Clauses (a) and (c), and under the Government's contentions in this case we would have an estate tax levied upon appointed estates under the Act of 1919 under each of the three clauses (a), (c) and (e), and under Clause (c) such tax would be levied upon all property appointed under powers general or special, because an appointment under a special power is as much of a "transfer" as the exercise of an appointment under a general power.

But it is clear that Congress never intended at any time to levy an estate tax upon property not owned by the decedent but passing under a special power. Under Clause (b) of the Act of 1916 there is no distinction possible between property passing under a *general* power and property passing under a *special* power.

It is clear, however, that Clause (e) of the Act of 1919 was added to the Revenue Act because there were no clear and express words in the Revenue Act of 1916 im-

posing a tax upon appointed property. Clause (e) of the Act of 1919 was added to remedy this omission.

The report of the Committee on Ways and Means, quoted in the Government Brief, pages 8 and 9, explaining the reason for the addition of Clause (e), clearly shows that the addition was recommended upon the ground that by the reason of an omission in the Act of 1916 the intention of Congress was not carried into effect as to property passing under a general power of appointment. The report says:

"The absence of a provision including property transferred by power of appointment makes it possible, by resorting to the creation of such a power, to effect two transfers of an estate with the payment of only one tax." (Argument, p. 9.)

There is no reason for supposing that Congress in passing the Act of 1916 had any intention to tax any property never owned by the decedent. The subject matter of appointed estates not owned by decedent was doubtless not considered at all by the members of Congress who voted for the passage of the Act of 1916. It may well be that if such property had been considered by Congress, a provision similar to that contained in the Act of 1919 would have been included in the Revenue Act of 1916. But it was not so included. Its omission cannot be supplied by construction or by regulations issued by the Treasury Department; certainly not by a construction which makes appointed estates taxable in some states and not in others.

CONCLUSION.

To sustain any tax it must be imposed by clear and express language contained in the statute. The Act of 1916 does not contain clear and express language taxing appointed property never owned by the decedent. This is

clear from an examination of the language of the statute, and is also supported by the following facts,—(1) That the Government is obliged to find the intention of Congress to tax appointed property from a report of the Ways and Means Committee made two years after the passage of the Act of 1916; and (2), by the construction of the act by the Treasury Department by a regulation issued in 1917, which has since been amended so as to make the tax collectible in some of the states and not in others; and (3) that Congress found it necessary to amend the Act of 1916 by the addition of a clause expressly providing for the taxation of property passing under a general power by appointment.

If clear and express words imposing the tax were found in the statute, any reference to committee reports and regulations of the Treasury Department to show the intention of Congress to levy the tax would have been wholly unnecessary and would not have been made; nor would Congress have found it necessary to add the new clause in 1919 levying the tax. The fact that the Government's contention in favor of the taxes in question is based upon a construction of the Act of 1916, which makes the taxes upon appointed property collectible in some states and not in others, is fatal to the validity of the taxes.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 442.—OCTOBER TERM, 1920.

The United States, Appellant, vs. Stanley Field, as Executor of the Estate of Kate Field, deceased.	}	Appeal from the Court of Claims.
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[February 28, 1921.]

Mr. Justice PITNEY delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims sustaining a claim for refund of an estate tax exacted under Title II of the Revenue Act of September 8, 1916, as amended by Act of March 3, 1917 (Ch. 463, 39 Stat. 756, 777; Ch. 159, 39 Stat. 1000, 1002). It presents the question whether the Act taxed a certain interest that passed under testamentary execution of a general power of appointment created prior but executed subsequent to its passage.

The facts are as follows: Joseph N. Field, a citizen and resident of Illinois, died April 29, 1914, leaving a will which was duly admitted to probate in that State, and by which he gave the residue of his estate, after payment of certain legacies, to trustees, with provision that one-third of it should be set apart and held as a separate trust fund for the benefit of his wife, Kate Field, the net income to be paid to her during life, and from and after her death the net income of one-half of said share of the trust estate to be paid to such persons and in such shares as she should appoint by last will and testament. The trust was to continue until the death of the last surviving grandchild of the testator who was living at the time of his death, and at its termination the undistributed estate was to be divided among named beneficiaries or their issue, *per stirpes*, in proportions specified. Kate Field died April 29, 1917, a resident of Illinois, leaving a will which was duly probated in that State, by which she executed the power of appointment, directing that the income to which the power related should be paid in equal shares to her children surviving at the

date of the respective payments, the issue of any deceased child to stand in the place of such deceased child. The collector of internal revenue, assuming to act under the Revenue Act of 1916, as amended, and Regulations issued by the Commissioner of Internal Revenue, included as a part of the gross estate of Kate Field the appointed estate passing under her execution of the power; and proceeded to assess and collect an estate tax based upon the net value thereof, and amounting to \$121,059.60. Her executor, having paid the tax under protest, and having made a claim for refund which was considered and rejected by the Commissioner of Internal Revenue, brought this suit and recovered judgment, from which the United States appeals.

The Revenue Act of 1916, in sec. 201 (39 Stat. 777), imposes a tax equal to specified percentages of the value of the net estate "upon the transfer of the net estate of every decedent dying after the passage of this Act." By sec. 203 (p. 778) the value of the net estate is to be determined by subtracting from the value of the gross estate certain specified deductions. The gross estate is to be valued as follows:

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

"(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;"

The amendment of March 3, 1917, (39 Stat. 1002), pertains merely to the rates, and need not be further considered.*

*The Act was further amended October 3, 1917 (Ch. 63, 40 Stat. 300, 324); superseded and repealed by Act of February 24, 1919 (Ch. 18, 40 Stat. 1057, 1096, 1149).

The provision quoted from sec. 202 was construed by the Treasury Department, in U. S. Internal Revenue Regulations No. 37, relating to Estate Taxes, revised May, 1917, Art. XI, as follows: "Property passing under a general power of appointment is to be included as a portion of the gross estate of a decedent appointor."

No question being suggested as to the power of Congress to impose a tax upon the passing of property under testamentary execution of a power of appointment created before but executed after the passage of the taxing act (See *Chanler v. Kelsey*, 205 U. S. 466, 473, 478-479; *Knowlton v. Moore*, 178 U. S. 41, 56-61), the case involves merely a question of the construction of the Act. Applying the accepted canon that the provisions of such acts are not to be extended by implication (*Gould v. Gould*, 245 U. S. 151, 153), we are constrained to the view— notwithstanding the administrative construction adopted by the Treasury Department—that the Revenue Act of 1916 did not impose an estate tax upon property passing under a testamentary execution of a general power of appointment.

The Government seeks to sustain the tax under both clauses above quoted from sec. 202.

The conditions expressed in clause (a) are to the effect that the taxable estate must be (1) an interest of the decedent at the time of his death, (2) which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and (3) is subject to distribution as part of his estate. These conditions are expressed conjunctively; and it would be inadmissible, in construing a taxing act, to read them as if prescribed disjunctively. Hence, unless the appointed interest fulfilled all three conditions, it was not taxable under this clause.

The chief reliance of the Government is upon the rule, well established in England and followed generally, but not universally, in this country, that where one has a general power of appointment either by deed or by will, and executes the power, equity will regard the property appointed as part of his assets for the payment of his creditors in preference to the claims of his voluntary appointees. See *Brandies v. Cochrane*, 112 U. S. 344, 352.

The English cases are fully reviewed by the House of Lords in *O'Grady v. Wilmot* (1916) 2 A. C. 231, 246, *et seq.* Illustrative

cases in the American courts are *Johnson v. Cushing*, 15 N. H. 298, 307; *Rogers v. Hinton*, 62 N. C. 101, 105; *Clapp v. Ingraham*, 126 Mass. 200, 202; *Knowles v. Dodge*, 1 Mack. (D. C.) 66, 72; *Freeman v. Butters*, 94 Va. 406, 411; *Tallmadge v. Sill*, 21 Barb. 34, 51, *et seq.*; *contra*, per Gibson, C. J., in *Commonwealth v. Duffield*, 12 Pa. 277, 279-281; *Pearce v. Lederer*, 262 Fed. Rep. 993; affirmed, *Lederer v. Pearce*, 266 Fed. Rep. 497.

It is tacitly admitted that the rule obtains in Illinois, and we shall so assume.

But the existence of the power does not of itself vest any estate in the donee. *Collins v. Wickwire*, 162 Mass. 143, 144; *Keays v. Blinn*, 234 Ill. 121, 124; *Walker v. Treasurer*, 221 Mass. 600, 602-603; *Shattuck v. Burrage*, 229 Mass. 448, 451. See *Carver v. Jackson*, 4 Pet. 1, 93.

Where the donee dies indebted, having executed the power in favor of volunteers, the appointed property is treated as equitable, not legal, assets of his estate; *Clapp v. Ingraham*, 126 Mass. 200, 203; *Patterson Co. v. Lawrence*, 83 Ga. 703, 707; and (in the absence of statute), if it passes to the executor at all, it does so not by virtue of his office but as a matter of convenience and because he represents the rights of creditors. *O'Grady v. Wilmot* (1916) 2 A. C. 231, 248-257; *Smith v. Garey*, 2 Dev. & Bat. Eq. (N. C.) 42, 49; *Olney v. Balch*, 154 Mass. 318, 322; *Emmons v. Shaw*, 171 Mass. 410, 411; *Hill v. Treasurer*, 229 Mass. 474, 477.

Where the power is executed, creditors of the donee can lay claim to the appointed estate only to the extent that the donee's own estate is insufficient to satisfy their demands. *Patterson Co. v. Lawrence*, 83 Ga. 703, 708; *Walker v. Treasurer*, 221 Mass. 600, 602-603; *Shattuck v. Burrage*, 229 Mass. 448, 452.

It is settled that (in the absence of statute) creditors have no redress in case of a failure to execute the power. *Holmes v. Coghill*, 7 Ves. 499, 507, affirmed, 12 Ves. 206, 214-215; *Gilman v. Bell*, 99 Ill. 144, 150; *Duncanson v. Manson*, 3 App. D. C. 260, 273.

And, whether the power be or be not exercised, the property that was subject to appointment is not subject to distribution as part of the estate of the donee. If there be no appointment, it goes according to the disposition of the donor. If there be an appointment to volunteers, then, subject to whatever charge creditors may

have against it, it goes not to the next of kin or the legatees of the donee, but to his appointees under the power.

It follows that the interest in question, not having been property of Mrs. Field at the time of her death, nor subject to distribution as part of her estate, was not taxable under clause (a).

We deem it equally clear that it was not within clause (b). That clause is the complement of (a), and is aptly descriptive of a transfer of an interest in decedent's own property in his lifetime, intended to take effect at or after his death. It cannot, without undue laxity of construction, be made to cover a transfer resulting from a testamentary execution by decedent of a power of appointment over property not his own.

It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed; and none was expressed in the Act under consideration. In that of February 24, 1919, which took its place, the section providing how the value of the gross estate of the decedent shall be determined contains a clause precisely to the point (sec. 402 (e), 40 Stat. 1097): "To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except", etc. Its insertion indicates that Congress at least was doubtful whether the previous Act included property passing by appointment. See *Matter of Miller*, 110 N. Y. 216, 222; *Matter of Harbeck*, 161 N. Y. 211, 217-218; *United States v. Bashaw*, 50 Fed. Rep. 749, 754. The Government contends that the amendment was made for the purpose of clarifying rather than extending the law as it stood, and cites a statement to that effect in the Report of the House Committee on Ways and Means (House Doc. No. 1267, p. 101, 65th Cong., 2d Sess.). It is evident, however, that this statement was based upon the interpretation of the Act of 1916 adopted by the Treasury Department; the same report proceeded to declare (p. 102) that "The absence of a provision including property transferred by power of appointment makes it possible, by resorting to the creation of such a power, to effect two transfers of an estate with the payment of only one tax;" and this, together with

the fact that the committee proposed that the law be amended, shows that the Treasury construction was not treated as a safe reliance.

The tax in question being unsupported by the taxing act, the Court of Claims was right in awarding reimbursement.

Judgment affirmed.

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Clerk Supreme Court, U. S.

